CONTENTS

	Page
I. STATEMENT	1
II. THE STATUTE	2
The Valuation Act, approved March 1, 1913 (37 Stat. 701)	2
Kansas City Southern Railway v. *Commission*, 252 U. S. 178	8
Amendment to Valuation Act, approved June 7, 1922 (42 Stat. 624)	8
III. THE FACTS	9
The Delaware & Hudson Co. v. *United States*, 295 Fed. Rep. 558, 560	11, 12
IV. THE LIGHT OF THE ENVIRONMENT IN WHICH CONGRESS PASSED THE VALUATION ACT	14
Stafford v. *Wallace*, 258 U. S. 495, 512, 513	14
(a) EARLY STAGES OF THE ACT OF MARCH 1, 1913	15
(b) PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES, ACT OF MARCH 1, 1913	15
Report of Committee on Interstate and Foreign Commerce of the House of Representatives, December 3, 1912 (Cong. Rec., Vol. 49, Pt. 1, p. 47)	15
(c) PROCEEDINGS IN THE SENATE, ACT MARCH 1, 1913	18
Report of Committee on Interstate Commerce of the Senate, February 20, 1913, on H. R. 22593, (Senate Report No. 1290, 62nd Congress, 3d Session)	19
Statement, Representative Cooper (Wisconsin) (Cong. Rec., Vol. 49, Pt. 5, p. 4256)	21
(d) PROCEEDINGS IN THE SENATE ON THE AMENDMENT FOLLOWING THE KANSAS CITY SOUTHERN CASE	22
Report of Committee on Interstate Commerce on amendment to Valuation Act (Senate Report No. 496, 67th Congress, 2nd Session, February 13, 1922)	22
(e) PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES ON THE AMENDMENT FOLLOWING THE KANSAS CITY SOUTHERN CASE	25
Report of the House Committee on Interstate and Foreign Commerce on amendment to Valuation Act (House Report No. 744, 67th Congress, 2nd Session, February 28, 1922)	26

Page

V. THE TENTATIVE VALUATION IS NOT JUSTICIABLE. 28

Ex parte 74, Increased Rates 1920, 58 I. C. C. 220, 229 28

Kansas City Southern v. *Commission*, 252 U. S. 178 .. 30

(a) ORDINARY MEANING OF WORDS 32

United States v. *Garbish*, 222 U. S. 257, 261 32

United States v. *First National Bank*, 234 U. S. 245, 258 32

Webster's Unabridged Dictionary 32

Standard Dictionary 33

Century Dictionary 33

(b) THE PRIMA FACIE EFFECT OF THE TENTATIVE AND FINAL VALUATIONS WAS DELIBERATELY ADOPTED BY THE CONGRESS AFTER FULL DEBATE 33

Statement Senator Root (New York) 33

Statement Senator La Follette (Wisconsin) 34

Statement Senator Cummins (Iowa) 34

(c) THE TENTATIVE VALUATION DEPRIVES NO CARRIER OF A CONSTITUTIONAL RIGHT 35

Meeker v. *Lehigh Valley Railroad Co.*, 236 U. S. 412, 430 36

Mills v. *Lehigh Valley Railroad Co.*, 238 U. S. 473, 481 38

Commerce Court Act (36 Stat. 539, 540) 39

VI. CONCLUSION 41

APPENDIX A

STATEMENTS OF MEMBERS ON THE FLOOR OF THE HOUSE, ACT OF MARCH 1, 1913 42

Representative Esch (Wisconsin) 42

Representative Madden (Illinois) 46

Representative Campbell (Kansas) 57

Representative Cullop (Indiana) 58

Representative Borland (Missouri) 65

APPENDIX B

STATEMENT OF SENATOR LA FOLLETTE (WISCONSIN) ON THE FLOOR OF THE SENATE, ACT OF MARCH 1, 1913 67

APPENDIX C

STATEMENT OF SENATOR CUMMINS (IOWA) ON THE FLOOR OF THE SENATE, ON THE AMENDMENT FOLLOWING THE DECISION IN THE KANSAS CITY SOUTHERN CASE 79

APPENDIX D

Page

STATEMENTS OF MEMBERS ON THE FLOOR OF THE HOUSE ON THE AMENDMENT FOLLOWING THE DECISION IN THE KANSAS CITY SOUTHERN CASE 86
Representative Newton (Minnesota) 86
Representative Graham (Illinois) 90
Representative Merritt (Connecticut) 91
Representative Denison (Illinois) 93
Representative Mapes (Michigan) 95
Representative Hoch (Kansas) 97

APPENDIX E

STATEMENTS OF SENATOR OWEN AND REPRESENTATIVE OLMSTED ON EFFECT OF TENTATIVE AND FINAL VALUATIONS 99
Senator Owen (Oklahoma) 99
Representative Olmsted (Pennsylvania) 100

CASES CITED

Delaware & Hudson Company v. *United States*, 295 U. S. 558, 560 ..... 11, 12
Ex parte 74, Increased Rates 1920, 58 I. C. C. 220, 229 28
Kansas City Southern v. *Commission*, 252 U. S. 178 ..... 8, 31
Meeker v. *Lehigh Valley Railroad Co.*, 236 U. S. 412, 430 36
Mills v. *Lehigh Valley Railroad Co.*, 238 U. S. 473, 481 38
Stafford v. *Wallace*, 258 U. S. 495, 512 14
United States v. *Garbish*, 222 U. S. 257, 261 32
United States v. *First National Bank*, 234 U. S. 245, 258 32

STATUTES CITED

The Valuation Act (37 Stat. 701) 2
Amendment to Valuation Act (42 Stat. 624) 8
The Commerce Court Act (36 Stat. 539) 39
The Urgent Deficiencies Act (38 Stat. 219) 39

In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 212

THE DELAWARE & HUDSON COMPANY, THE ALBANY & SUSQUEHANNA RAILROAD COMPANY, THE RENSSELAER AND SARATOGA RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

I

STATEMENT

The appeal is from the final decree of the District Court which sustained motions to dismiss the petition of the appellants on the ground "that there is no equity in this application to suppress a merely preliminary step in a lawful valuation proceeding." (Tr. 259, Circuit Judge Hough and District Judges Knox and Goddard concurring, Tr. 260; 295 Fed. Rep. 558.)

added June 7 - 1922

II

THE STATUTE

The first Valuation Act was approved March 1, 1913, as an amendment to the Interstate Commerce Act and designated as Section 19-a. (37 Stat. 701.) The Valuation Act, after providing "That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this act," further provided: [1]

* * * * *

(*b*) First. In such investigation said Commission shall ascertain and report in detail as to each piece of property, *other than land*, owned or used by said common carrier for its purposes as a common carrier, the original

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[1] The paragraphs omitted from the text are as follows:

SEC. 19a. (*As amended February 28, 1920, and June 7, 1922.*) (*a*) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

* * * * *

(*c*) Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and

cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed and of the reasons for any differences between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and

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separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(*d*) Such investigation shall be commenced within sixty days after approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(*e*) Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise

the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any

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ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

* * * * *

(*g*) To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the Commission may require.

* * * * *

(*k*) The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

(*l*) That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in

consideration of such aid, gift, grant, or donation.

* * * * *

(*f*) Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuation, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

* * * * *

(*h*) Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no pro-

test is filed within thirty days, said valuation shall become final as of the date thereof.

(*i*) If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(*j*) If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and sub-

> stantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend, or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

Following the decision of this Court in *Kansas City Southern Railway* v. *Commission*, 252 U. S. 178, the Valuation Act, on June 7, 1922, was amended so as to relieve the Commission of a burden which this Court had held the original act imposed upon it (42 Stat. 624).[2]

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[2] Chap. 210. An Act To further amend an Act entitled "An Act to regulate commerce," approved February 4, 1887, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the paragraph entitled "First" of section 19a of the Interstate Commerce Act, as amended, is amended by inserting after the words "In such investigation said com-

III

THE FACTS

On March 28, 1923, the Commission declared "the tentative valuations of the properties" of the appellants. (Tr. 15.) On the same day it issued notice that the Commission "has completed the tentative valuations of the properties of appellants as of June 30, 1916," and "that said valuations are set forth in the tentative valuation report which is included in the order adopting the same." The notice required appellants to file with the Commission on or before thirty days from April 12, 1923, any protests

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mission shall ascertain and report in detail as to each piece of property" the words and commas following: ", other than land,"; so that said paragraph as amended shall read as follows:

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values."

SEC. 2. That the paragraph entitled "Second" of said section 19a is amended by striking out the comma after the words "and the present value of the same," and inserting a period in place thereof, and by striking out the words "and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value" at the end of said paragraph, so that said paragraph as amended shall read as follows:

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purpose of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same."

Approved, June 7, 1922 (42 Stat. 624).

which they may desire to make to such valuation or any part thereof. (Tr. 15.)

On May 10, 1923, and within thirty days from April 12, 1923, the appellants, and each of them, made and filed "their protest against and to the order in the above-entitled proceeding, and every part thereof, including any document or documents or other matter or matters that may be held or considered to have been part thereof by any reference therein contained." (Tr. 242.)

The comprehensive protest embraces fifteen full pages of the closely printed transcript. (Tr. 242–256.)

On June 13, 1923, under the Urgent Deficiencies Act (Tr. 2) the appellants filed the petition and prayed for a permanent injunction (Tr. 12) decreeing that the order of the Commission "be set aside, annulled, and suspended, and that its enforcement, operation, and execution, and the entry of any order based thereon fixing any final value, and the entry of any order fixing final value before a lawful tentative valuation has been made, and the use of any final value based upon said order by said Commission in any proceeding before said Commission and by said Commission in any judicial proceeding, be forever enjoined." (Tr. 12.)

One of the main charges, if not the main charge, in the petition is that the Commission has not ascertained or reported, in detail or otherwise, "any original cost to date" as to each piece of property other than land, owned or used for common carrier purposes. (Tr. 6.) From petition and brief of oppos-

ing counsel, one would suppose that the Commission had ignored utterly the Congressional mandate to ascertain and report that item. That the Commission exhausted its power to ascertain and report the original cost to date is disclosed by the transcript. Owing to the inadequacy of records original cost to date was not always ascertainable from those sources. As to Delaware & Hudson (Tr. 22), the Albany (Tr. 35), the Rensselaer (Tr. 40), the Vermont (Tr. 45), the Ruthall (Tr. 48), the Saratoga (Tr. 51), the Northern (Tr. 54), the Ticonderoga (Tr. 58), the Placid (Tr. 60), the Dannemora (Tr. 63). For other items, see Tr. 101, 119, 122, 125, 128, 130, 139, 149, 157, 166, 171, 173, 177, 179, 182, 185, 192, 202, 205, 214, 221, 225, 227.

The item "cost of reproduction new less depreciation" likewise was not seriously neglected if the Tentative Valuation fixed by the Commission is to be taken at its face.

The charges of the petition were fully summarized by the learned District Court, thus (Tr. 258; 295 Fed. Rep. 560):

> An examination of the petition and a comparison thereof with the protest filed by petitioners shows that the substance of complaint may be summarily stated as follows: The Commission did not ascertain the original cost to date of each piece of property other than land used by petitioners for common carrier purposes; it did not report in detail the original cost of lands, rights of way, and terminals owned or used for common carrier

> purposes by petitioners; it did not report the original cost and present value or either of any property held by petitioners for purposes other than those of a common carrier; it omitted certain specified railroad tracks or portions thereof which one of said petitioners is entitled to use as well as certain other railway and/or terminal adjuncts used by one of the petitioners jointly with other carriers; and it did not report the value as a whole of the properties of petitioners.
>
> We have not set forth all the objections of petitioners, but the above are sufficient to indicate the kind of objection made, on which and by reason of which it is demanded that the "tentative valuation" be suppressed and held for naught.

Nor had the learned District Court any difficulty in quickly reaching the conclusion that the Commission had discharged the full duty required of it by the statute in declaring the tentative valuation, thus (Tr. 258, 259; 295 Fed. Rep. 560, 561):

> We repeat that we regard this "tentative valuation" under the statute as an ex parte appraisement. Any such matter necessarily gives rise to many differences of opinion. The evident object of the statute is to ascertain for purposes of rate making and money borrowing the reasonable and probably going value of that property which is devoted to serving the public as a common carrier. What particular pieces of property are so used is oftentimes matter of opinion about which honest and well informed men may differ. As to original

cost, it is to be remembered that at least one of these petitioners can trace its corporate life backward for nearly a century; and the ascertainment of some items of original cost, as well as added cost, may be in the opinion of many if not most men a veritable impossibility.

No statute law should be held to require the impossible unless the language thereof permits of no other interpretation. It would serve no useful purpose to go into detail, but after examination this court is of opinion that the Commission's "tentative valuation" complies with the spirit of the statute, and on its face comes as near to complying with the letter as the facts permitted, in the Commission's opinion.

Argument has developed as petitioners' legal position that they are entitled to a literal compliance with the statute because the protest (treated as a pleading) puts them in the position of plaintiffs upon whom lies the burden of proving that the "tentative valuation" is erroneous, incomplete, or otherwise unjust.

We perceive no force in this objection, and think that the protest no more than serves to limit discussion of the questions of fact and law which must arise upon any such valuation.

The tentative valuation declared by the Commission is extensive. Cursory examination alone will disclose that the Commission complied with the statute. Close inspection of the "tentative valuation" will demonstrate that the Commission in all

respects and as far as was humanly possible strictly complied with the statute. Certainly that is true for the purpose of the undetermined protest.

IV

THE LIGHT OF THE ENVIRONMENT IN WHICH CONGRESS PASSED THE VALUATION ACT

In examining important statutes the light of the environment in which Congress acted is always instructive and helpful. The subject of the valuation of the property owned or used by railroad companies for common carrier purposes has been before the Congress, in various forms, for a great many years.

In *Stafford* v. *Wallace*, 258 U. S. 495, 512, 513, in sustaining the constitutionality of the so-called Packers and Stockyards Act of 1921, Ch. 64, 42 Stat. 159, this Court, speaking through Mr. Chief Justice Taft, said:

> We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees on Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought before it the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to

remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. (*Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Danciger* v. *Cooley*, 248 U. S. 319, 322.)

(a) EARLY STAGES OF THE ACT OF MARCH 1, 1913

The Senate Committee on Interstate Commerce in its report when it presented the first bill to the Senate stated the evils which the bill was intended to remedy. Among other things the Committee said: "That the stock and bonded indebtedness of the roads largely exceed the actual cost of their construction or their present value, and that unreasonable rates are charged in the effort to pay dividends on watered stock and interest on bonds improperly issued." (Cong. Rec., Vol. 49, Pt. 4, p. 3795.)

In its annual reports to Congress for the years 1903, 1907, 1908, 1909, 1911, and 1912, the Commission renewed its recommendation for physical valuation (Cong. Rec., Vol. 49, Pt. 4, pp. 3795, 3796).

(b) PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES, ACT OF MARCH 1, 1913 [1]

Committee on Interstate and Foreign Commerce, 62nd Congress, on December 3, 1912, laid before the House its report on Bill No. 22593 which provided for physical valuation of the property of carriers subject to the Act to Regulate Commerce, as follows (Cong. Rec., Vol. 49, Pt. 1, p. 47):

> The Committee on Interstate and Foreign Commerce, to whom was referred the bill

[1] For statements of Members on the floor of the House, see Appendix A.

(H. R. 22593) to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, by providing for physical valuation of the property of carriers subject thereto and securing information concerning their stocks and bonds and boards of directors, having considered the same, report thereon with a recommendation that it pass.

The Interstate Commerce Commission in its annual reports has often set forth the importance of an official valuation of the property of the carriers subject to the act to regulate commerce. The difficulties encountered in the effort to correct rates through the claims as to valuation of property have been described. The opinions of the courts likewise have laid great stress upon the element of valuation as a factor in determining rates. The people not only acquiesce in those views but they desire accurate information on the subject. Perhaps at one time or another every Member of the House of Representatives who has served more than one term has voted to authorize such official valuation. It seems to be universally favored regardless of partisan lines. Not less important is the matter of information as to the stocks and bonds of the carrier corporations, the manipulation of the finances which control those carriers, and the boards of directors, stockholders, and bondholders themselves, who really give direction to all their affairs. The anomaly has grown up, gradually and unconsciously as it were, grown up in the courts themselves as well as

the commission, that public carriers are to be allowed to charge an income on what they owe as well as on what they own. Nobody else in the world with whom we are acquainted is allowed that privilege. First, there is a claim set up of the investment, actual or watered, and an income is allowed for that. Then, as a part of the fixed charges—annual burden of doing business—the interest on the bonds is considered and allowance made for that, whether the bonds sold at par or at a liberal discount, or whatever the circumstances may have been. Furthermore, financial institutions and sources either identical or more or less related secure control of the issues of stock and the boards of directors and thereby easily control the issues of bonds. Then it is not surprising that common stockholders and common directors in different corporations manage to place the bonds in the hands of common bondholders.

Whatever the evils or advantages of such financial manipulation and consolidation may be it is unnecessary in this report to discuss. The complaints of millions of shippers attest the dissatisfaction of the people. They are entitled to have the truth known. Full information, full publicity as to the true conditions of the issues of stocks and bonds, the cost to the holder, the price realized by the carriers, the disposition of the money, the facts as to the manipulations, will all shed light upon the question of correcting rates by the commission and their revision by the courts, and the information of all those things will help

the people to a correct understanding thereof. If the wrongs complained of have been exaggerated, the people will be satisfied when they know the truth. If, on the other hand, the alleged wrongs or any considerable part of them are shown by the investigation really to exist, in the light of the truth they can be corrected. It is our intention in reporting this bill that when the proposed investigation shall have revealed the truth as to the matters involved, the light shall continue to shine on all future transactions and operations as to physical property, stocks, bonds, boards of directors, and financial control. To that end the bill provides that the commission shall continue to keep itself informed by continuing the investigation as to all extensions and new constructions and improvements and all increases in physical value, so as to keep such official valuation up to date all the time. Existing law, in section 20 of the act to regulate commerce, already provides for similar work and information as to stocks and bonds, so that if this bill passes it will not only result in securing information as to present conditions but also in continuing the work so as to show forth the full truth and exact facts as to future transactions as they occur, so as to show the true condition at all times.

We hope that the bill herewith reported may meet with the approval of Congress and speedily become a law.

(c) PROCEEDINGS IN THE SENATE, ACT MARCH 1, 1913

SENATOR LA FOLLETTE (Wisconsin) member of the Committee on Interstate Commerce, on February 20,

1913, submitted the report of the Committee on valuation of the several classes of property of common carriers, which contains the following (Senate Report No. 1290, 62d Congress, 3d Session, February 20, 1913, to accompany H. R. 22593):

> The amendments in the succeeding paragraphs of the bill relating to procedure are designed to make the original purposes of these paragraphs more definite and certain of administration. Under the terms of the House bill, whenever the commission completes the valuation of the property of any common carrier, it is required to give notice and grant a hearing thereon to such carrier, with a view of making any necessary corrections before such valuation becomes final. The Senate committee amendment designates such completed valuation as "tentative" for the time being and provides that notice shall be given not only to the common carriers but also to the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said common carrier and providing that any or all parties notified who protest shall be heard before such tentative valuation shall become final. The Senate amendment further provides that such final valuation shall be prima facie evidence in all judicial proceedings for the enforcement of the original interstate commerce act, and all amendments thereto, and in any judicial

proceeding brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

The Senate committee recommends the further amendment, that if, upon the trial of any action involving the final value fixed by the commission, evidence should be introduced regarding such valuation which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and stay further proceedings in such action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same, and may fix a final value different from the final value fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of, and the court shall then proceed to render judgment thereon, as though made by the commission in the first instance. If the original order of the commission shall not be rescinded or changed by it, the court shall render judgment upon such original order.

Up to 1906 the commission had sustained 32 reversals in the Supreme Court. In 26 of

> those cases the record discloses that the orders of the commission were reversed, because testimony was offered upon the trial before the court which was not offered when the case was presented to the commission.
>
> The purpose of this amendment is to give the commission the benefit of any testimony which may be offered as to the valuation, which was not presented to the commission on its hearing of the proceeding. If the commission finds the new testimony material and important it is afforded opportunity to modify its order in the proceeding. Such modification of the order may lead to withdrawal of the appeal or to confirmation of the order by the court. In any event, it is fair to the commission and to the public, imposes no hardship upon the parties, and may work a great saving of time and expense incident to reversal and retrial.[4]

SPEAKER CLARK (Missouri), on February 27, 1913, laid before the House bill 22593, which provided for the physical valuation of the property of the carriers.

The Senate amendments were agreed to and the bill was passed with the following statement by REPRESENTATIVE COOPER (Wisconsin) (Cong. Rec., Vol. 49, Pt. 5, p. 4256):

> Mr. Speaker, I take this brief opportunity to observe that the changes in public opinion and in political conduct in this Republic are sometimes very wonderful. In 1908—only four years ago—in the Republican national

[4] For statement of Senator La Follette on the floor of the Senate, see Appendix B.

convention at Chicago, I presented a platform containing, among other things, a plank calling for the physical valuation of railroads. On this plank I demanded and secured a separate vote. The plank met with shouts of "Take it to Denver," "Socialist," and other evidences of disfavor, and received less than 30 votes out of a total of about 1,000. And yet we have just seen a bill calling for the physical valuation of railroads pass this House by a unanimous vote.

(d) PROCEEDINGS IN THE SENATE ON THE AMENDMENT FOLLOWING THE KANSAS CITY SOUTHERN CASE

SENATOR CUMMINS (Iowa), of the Senate Committee on Interstate Commerce, on February 13, 1922, submitted the report of the Committee on the amendment to the Valuation Act, which contains the following (Senate Report 496, 67th Congress, 2d Session, Feb. 13, 1922):

It will be noted that the law, if so amended, will still require the commission to ascertain and report the present value of railroad lands, and in ascertaining that value it may use all lawful methods and include all proper elements. If, however, this amendment prevails, the commission will not be required to ascertain or report separately the excess of cost of present condemnation or of purchase over either original cost or present value.

When the commission completed its first valuation it held that it was impossible to ascertain or report as a separate item what it would cost a railroad company to acquire by condemnation or purchase its existing right

of way and lands used for carrier purposes, and therefore that it could not comply with the command of the statute directing it to report excess of cost over present value.

In reaching this conclusion the commission followed what it believed to be the ruling of the Supreme Court of the United States, announced in June, 1913, in the *Minnesota rate cases.* (230 U. S. 352.) It applied this construction of the statute to several railroads, and among them the Kansas City Southern Railway Co. That railroad company thereupon brought an action of mandamus against the commission to require it to find and report the excess cost above described. The case finally came to the Supreme Court of the United States, and that court, on March 8, 1920 (*United States ex rel. Kansas City Southern Railway* v. *Interstate Commerce Commission,* 252 U. S. 178), rendered a decision reversing the judgment of the court below and ordering the commission to make a finding and report in compliance with the words of the statute.

* * * * *

While the case last cited was still pending the commission recommended the change in the law which this bill proposes and it still holds that attitude toward the matter.

Since the decision of the Supreme Court in the *Kansas City Southern Railway case* the commission and the Bureau of Valuation have been attempting to comply with it. The testimony in the hearings submitted herewith show without any dispute whatever the manner in which it is making the attempt. The

commission first finds what it calls the present value of lands or lots by ascertaining the value of adjacent lands or lots and attaching the same value, area for area, to the railroad lands and lots. It then classifies the railroad property into types and uses a multiplier varying according to the type to ascertain the present cost of acquisition. For instance, take the case of the Kansas City Southern Railway. The commission found the present value of carrier lands to be $2,609,155. By the use of various multipliers it found "the present cost of condemnation and damages in excess of present value of lands to be $2,735,490. That means, in substance, that it used, in the average, a multiplier of two (2).

* * * * *

It is the opinion of the committee that it is not only an indefensible expenditure of public money to do the work required of the commission by that part of the statute which the bill seeks to eliminate, but the result of the work when done will be valueless and mischievous. It may be that the commission is not employing sound principles in ascertaining what the statute calls the present value of lands. If it is not, the mistake will be unfortunate, but may hereafter be corrected. It can not be corrected, however, by the insistence that the commission shall do what is absolutely impossible; namely, to ascertain what it would cost any given railroad company to acquire its present right of way or lands at the present time. In order to do this it

must be first assumed that the railroad has not been constructed and is not in operation, for it would be outrageously unjust to find a value largely contributed by the existence of the railroad and then multiply that value by 2, 3, or 4, because a right-of-way strip would cost more per acre than the adjacent farm is worth per acre.

Second. It must be assumed that the company proposing to build the railroad would be compelled to buy or condemn its lands or lots constituting its right of way. An assumption of that character can not safely be made. A considerable proportion of the right of way now being used by railroad companies was either donated or conveyed for a small consideration. Who can say that this would not happen again if the railroads were destroyed? No matter what path may be pursued in the effort to comply with the part of the statute sought to be eliminated it leads into the field of pure conjecture.[5] (Senate Report No. 496, 67th Congress, 2nd Session, February 13, 1922.)

(e) PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES ON THE AMENDMENT FOLLOWING THE KANSAS CITY SOUTHERN CASE

REPRESENTATIVE SWEET (Iowa), of House Committee on Interstate and Foreign Commerce, on February 28, 1922, committed to the Committee of the Whole House report on the proposd amendment of the Valuation Act, which contains the following

[5] For statement of Senator Cummins on the floor of the Senate, see Appendix C.

(House Report No. 744, 67th Congress, 2nd Session, February 28, 1922):

> Section 19a of the interstate commerce act, as amended February 28, 1920, provides that the Interstate Commerce Commission shall investigate, ascertain, and report the valuation of all property owned or used by every common carrier, subject to the provisions of the interstate commerce act.
>
> That the paragraph entitled "First" of section 19a of the interstate commerce act provides that the commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reason for their differences, if any.
>
> As paragraph "First" of section 19a now reads it renders it necessary for the Interstate Commerce Commission to investigate, ascertain, and report the original cost to date, the cost of reproduction new, and the cost of reproduction less depreciation of each piece of property owned or used by a carrier for common carrier purposes. This paragraph standing alone might be construed as including all property used for common carrier purposes. The attorneys for the railroads have so contended, notwithstanding that paragraph "Second" of section 19a of the interstate commerce act deals exclusively with land used for carrier purposes.

For the purpose of removing any doubt and of preventing the possibility of argument upon that point, the bill has for its first object the cutting out of any possible application of paragraph entitled "First" to land used for common-carrier purposes, and to accomplish that purpose paragraph "First" as amended by this bill simply inserts after the word "property" the words "other than land," so that the paragraph entitled "First" as amended by this bill required the Interstate Commerce Commission to investigate, ascertain, and report the original cost to date, the cost of reproduction new, and the cost of reproduction less depreciation of each piece of property other than land.

Paragraph entitled "First" and paragraph entitled "Second" of section 19a are confined to property used for common carrier purposes. The property used for purposes other than those of a common carrier is covered by paragraph entitled "Third" of section 19a of the interstate commerce act as amended.

The bill amends paragraph "Second" of section 19a of the interstate commerce act by striking out of said paragraph the following: "and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value."

The Interstate Commerce Commission has had great difficulty in arriving at a conclusion as to just what paragraph "Second" means taken as a whole. The commission finally came to the conclusion that the words "and separately the original and present cost of con-

demnation and damages or of purchase in excess of such original cost or present value" were intended to cover the estimates of what the railroads would have to pay for the land if they had to reacquire it, more than the value of the land at the time would be.[6]

V

THE TENTATIVE VALUATION IS NOT JUSTICIABLE

Approximately 245,000 miles of railroad are involved in valuation proceedings. Including leased lines, this mileage is owned by 1,950 corporations and operated by 1,139 corporations. In *Ex parte 74, Increased Rates 1920*, 58 I. C. C. 220, 229, the tentative valuation fixed by the Commission for the purpose of rate advances was approximately: Eastern group, $8,800,000,000; Southern Group, $2,000,000,000; Western Group, $8,100,000,000.

Under the Valuation Act the Commission is required to give notice of all tentative valuations (1) to the carrier, (2) the Attorney General of the United States, (3) the Governor of any State in which the property so valued is located, and (4) to such additional parties as the Commission may prescribe. Thirty days are allowed in which to file protests with the Commission. No question is raised that the Commission failed to give the prescribed notice in the instant case, as the Delaware & Hudson seasonably filed its protest.

[6] For statements of Representatives on the floor of the House, see Appendix D.

If in that posture of the proceedings the Delaware & Hudson may maintain the petition to strike down the tentative valuation, it follows that carriers may do likewise, *ad infinitum*, until all of the tentative valuations have become the subject of equity proceedings in the District Courts of the United States. The valuation of the steam railway transportation system would thus be transferred from the Commission to the courts.

Similarly, if the equity proceedings are allowed as against the tentative valuation, they would, if unsuccessful, undoubtedly be recommenced after the final valuation. So that after the time had been lost in court proceedings over tentative valuation, and the case was restored to the Commission, the litigation would be renewed in the courts on the final valuation.

The Valuation Act also provides that "all final valuations by the Commission * * * shall be published and shall be *prima facie* evidence of the value of the property in all proceedings under the Act to Regulate Commerce * * * and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." The Valuation Act further provides that if upon the trial of any action involving a *final value* fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto, and substantially affecting said

value, the court, before rendering judgment, shall transmit such evidence to the Commission and the latter shall consider the same and may fix a final value different from the one fixed in the first instance and may alter, modify, amend, or rescind any order which it has made involving said final value, and shall report its action thereon to said court within a time fixed by the court. Any amended or modified order of the Commission made on such evidence shall be treated by the court as if it were the original order. The court may then proceed to enter judgment.

If the petition of appellants may be maintained, there are (*a*) the hearing on the petition in the court to enjoin the tentative valuation; (*b*) the hearing on the protest before the Commission; (*c*) the hearing on the second petition in the court to enjoin the final valuation; (*d*) the hearing on the evidence offered before the court in judicial proceedings in which the final valuation shall be *prima facie* evidence of value.[1] Add to all of these the right to file the petition for writ of mandamus, see *Kansas City Southern* v. *Com-*

[1] In *Los Angeles & Salt Lake Railroad* v. *United States*, in Equity, No. H–44–T, District Court of the United States, Southern District of California, Southern Division, the petitioner, one of the Union Pacific Lines, has filed an original petition for a perpetual injunction against the final valuation made by the Commission for rate-making purposes in the amount of $45,000,000 as of June 30, 1914, of the carrier's properties, as set forth in report, Valuation Docket No. 26, dated June 7, 1923, 75 I. C. C. 463.

In *United States ex rel Kansas City Southern Railway* v. *Commission*, at Law No. 69,065 Supreme Court of the District of Columbia, the carrier has prayed for a writ of mandamus against the Commission to compel a revision of the final valuation as of June 30, 1914, for rate-making purposes of the carrier's properties as set forth in supplemental report, Valuation Docket No. 4, dated March 4, 1924, 84 I. C. C. 113, and original report dated July 1, 1919, 1 Val. Rep. 223.

mission, 252 U. S. 178, and we will have at least five separate proceedings, through which the carriers may contest the work of the Commission under the Valuation Act which does not meet with their approval. Obviously with such unlimited judicial review the attempt at physical valuation by the Congress and the Commission will result in utter failure. The instant case is the best example.

The Valuation Act was approved March 1, 1913. March 28, 1923, approximately ten years later, the Commission declared the tentative valuation of the Delaware & Hudson properties. On May 10, 1923, the carriers filed their protest which stands undetermined before the Commission. On June 13, 1923, the injunction proceedings were commenced. If this court reverses the decree of the District Court and remands the case for hearing on the petition, it is no less than an adjudication that every other of the 1,138 operating common carriers shall have the same right as it is inconceivable that any of them will be satisfied with the tentative valuation made by the Commission.

Appellants lay before the court a tentative valuation, the finality of which has been stayed by the elaborate protest made and filed pursuant to the statute. They then ask for an injunction order or decree sweeping the whole proceeding out of the Commission and into the court for a judicial determination and revision of this tentative valuation. They exercised great caution not to relinquish their protest before the Commission. If they prevail

before the court over the Commission they may then safely abandon the protest. If they fail before the court on the merits and are denied the relief prayed, they may then go back to the Commission and on the protest attempt to prevail over the court. They are experimenting with their protest which they have transferred temporarily from the Commission to the court. They have everything to gain and nothing to lose. No statute or decision warrants such a course of procedure.

(a) ORDINARY MEANING OF WORDS

In providing for a *tentative* valuation "We must assume that the phrase was used with a consciousness of its meaning and with the intention of conveying such meaning." *United States* v. *Garbish*, 222 U. S. 257, 261; *United States* v. *First National Bank*, 234 U. S. 245, 258.

If the general rule of statutory construction is applied that words are to be given their usual and ordinary meaning, what is the meaning of *tentative*? Lexicographers are united in their definitions.

Webster's Unabridged Dictionary: *Tentative:* pertaining to, or based on, a trial or trials; experimental, as a tentative theory; testing, making a trial. Synonym: Provisional, Tentative. That is provisional which is adopted for the time being, especially in order to meet temporary conditions. That is tentative which is of the nature of a trial or experiment, as to make a provisional arrangement to adopt a tentative order of procedure.

Standard Dictionary: *Tentative*: 1. Used in making a trial; done as an experiment; founded on experiment; provisional or conjectural, as an opinion. 2 (Rare) Testing; experimenting.

Century Dictionary:[2] *Tentative*: 1. Based on or consisting in trial or experiment; experimental; empirical.

(b) THE PRIMA FACIE EFFECT OF THE TENTATIVE AND FINAL VALUATIONS WAS DELIBERATELY ADOPTED BY THE CONGRESS AFTER FULL DEBATE

SENATOR ROOT (New York) on February 24, 1913, speaking before the Senate as in Committee of the Whole, said (Cong. Rec. Vol. 49, Pt. 4, p. 3804):

> I wish to make a suggestion to the Senator from Minnesota. There may now be an issue raised upon which a question of value will be a relevant fact. The Interstate Commerce Commission has made an order fixing the rates, and the railway company comes into court asserting that those rates are confiscatory. Upon that issue the question of value is a relevant and material fact, is it not?
>
> Under the provision the Senator from Minnesota has adverted to it seems to me that that question of value is not made material and relevant under any circumstances in which it is not now material and relevant. It does not broaden the jurisdiction of the court to consider that question of value at all. It

[2] "Neither these nor any other speculations concerning the ultimate forms can, however, be regarded as anything more than *tentative*." H. Spencer, Prin. of Sociol., § 578.

"We can imagine a variety of hypotheses to explain every unexplained phenomenon, and it is only by successive *tentatives* that we reach any reliable explanation." G. H. Lewes, Probs. of Life and Mind., I. i., § 24.

> merely relates to the evidence of value in the cases where the court now can consider it and where they will then consider it. It merely puts into the trial of the question of value where it can now be tried and will then be tried new prima facie evidence supplied by the determination of the commission. It does not permit the court to retry that case or to review the decision of the commission under any other circumstances than they can do it now.

SENATOR LA FOLLETTE, on February 24, 1913, in explaining the Committee Report, said:

> This valuation is simply prima facie evidence of the value, and when the case is heard upon a question of rates before the court those values are all subject to attack both by the public and by the railroad company. (Cong. Rec., Vol. 49, Pt. 4, p. 3802.)

SENATOR CUMMINS (Iowa), on February 24, 1913, speaking before the Senate, as in Committee of the Whole, said (Cong. Rec., Vol. 49, Pt. 4, p. 3804):

> I think that is intended simply to enable the commission to change the order with respect to the rate that it has already made. If evidence with regard to value is developed in the court that has not been developed before the commission in its general work, and it has made an order fixing a rate upon a value which it finds to be wrong, then it is given the opportunity to change the order which is being attacked in the court, as may be required by the additional or different evidence with regard

to the value of the property. I do not think that it changes in the least degree the relation of the commission to the court. It simply furnishes, as I said in the beginning, evidence either for the railway company or for the public with regard to the value of the property that is devoted to public use—evidence that, of course, is not conclusive, and, in my opinion, it would not be competent for us to make it conclusive.

Mr. NELSON. But the Senator will concede that it changes the procedure which now prevails.

Mr. CUMMINS. I do not think it does at all; that is, if the Senator means the substance of the procedure. The railway company that complains of the action of the commission must still bring suit in a court of competent jurisdiction to annul the order of the commission. When it has brought the suit and made the issue it may take the work of the commission that is here provided for and introduce it as prima facie evidence of the value of the property, or the Government can take the work of the commission and introduce it as prima facie evidence of the value of the property. That is the only respect in which the relation has been changed.[3]

(c) THE TENTATIVE VALUATION DEPRIVES NO CARRIER OF A CONSTITUTIONAL RIGHT

The Valuation Act specifically provides for a judicial review of the valuation of the property used for common carrier purposes. This Court has

[3] For statements of Senator Owen and Representative Olmsted see Appendix E.

repeatedly held that reparation orders of the Commission which are made *prima facie* evidence in judicial proceedings are always rebuttable and do not deprive the carrier of any constitutional right. For the Commission to make inventories and assemble statistics and information upon which to base the valuation of railway properties used for common carrier purposes and preserve the same in its archives or report it to the Congress does not constitute a justiciable subject until such valuation is brought forward as the basis upon which to determine the rates of the carriers. It is enough that the carrier shall have the right to protest the tentative valuation and to introduce new evidence as against a final valuation when the latter becomes relevant in court proceedings. If limited to that right the carrier is not without due process of law.

Circuit Judge Hough appropriately designated the tentative valuation as "a merely preliminary step." (Tr. 259.)

In *Meeker* v. *Lehigh Valley Railroad Co.*, 236 U. S. 412, 430, 431, this Court, speaking through Mr. Justice Van Devanter, said:

> It is also urged, as it was in the courts below, that the provision in § 16 that, in actions like this, "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. *At most, therefore, it is merely a rule of evidence.* It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained, *Pillow* v. *Roberts*, 13 How. 472, 476; *Marx* v. *Hanthorn*, 148 U. S. 172, 182; *Turpin* v. *Lemon*, 187 U. S. 51, 59; Cooley's Constitutional Limitations, 7th ed. 525, as have many other State and Federal enactments establishing other rebuttable presumptions. *Mobile, &c., Railroad* v. *Turnipseed*, 219 U. S. 35, 42; *Lindsley* v. *Carbonic Gas Co.*, 220 U. S. 61, 81; *Reitler* v. *Harris*, 223 U. S. 437; *Luria* v. *United States*, 231 U. S. 9, 25. An instructive case upon the subject is *Holmes* v. *Hunt*, 122 Massachusetts, 505, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury. And in *Chicago, &c., Railroad* v. *Jones*, 149 Illinois, 361, 382, a like ruling was made in respect of a statutory provision similar to that now before us.

In *Mills* v. *Lehigh Valley Railroad Co.*, 238 U. S. 473, 481, this Court, speaking through Mr. Justice Hughes, said:

> When the Commission made the award "*as reparation*" they undoubtedly expressed the decision, as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as we have held in the second *Meeker Case*, a finding of the amount of damage as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation—that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction—and the amount which they stated as the sum to be paid "as reparation" on the specified shipments was the amount which they found necessary to accomplish the reparation—to afford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. '*The statutory provision merely establishes a rule of evidence.* It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, accord-

> ing to the fair import of its decision, the Commission did find the amount of damage in this case.

Moreover, if the petition in the instant case is sustained and the judicial review of the tentative valuation is allowed, then the express provisions for judicial proceedings in the Valuation Act become submerged. Urgent Deficiencies Act (38 Stat. 219) preserved the Commerce Court Act, the enforcement of which was reposed in the District Courts. Commerce Court Act (36 Stat. 539, 540) provides:

> The jurisdiction of the Commerce Court over cases of the foregoing classes *shall be exclusive;* but this act shall not affect the jurisdiction now possessed by any Circuit or District Court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

If the "tentative valuation" declared by the Commission is justiciable within the meaning of the Commerce Court Act, then the jurisdiction of the District Court is *exclusive*. The provisions of the Commerce Court Act and those of the Valuation Act for judicial review may not stand together; one or the other must fall. Congress did not intend any such conflict. The express provisions of the Valuation Act being the latest enactment on the subject and the two acts not allowing of a choice, the appellants should be relegated to that right of review which was preserved to them by the Valuation Act, of which they will undoubtedly avail themselves whenever

opportunity offers. *Expressio unius est exclusio alterius.*

Again, the provision that if upon the trial in court of any action involving a *final value* fixed by the Commission evidence shall be introduced regarding such value different from that previously offered before the Commission and substantially affecting such value, the court shall stay further proceedings and transmit a copy of such evidence to the Commission, which the Commission shall consider and upon which it may fix a *final value* different from the one fixed in the first instance, and may alter, modify, amend, or rescind any order which it has made involving said final value, and shall then report its action back to the court, is the express unequivocal enactment by the Congress that the Commission and not the court is the authority upon whom the responsibility is fixed for a physical valuation of railway properties used for common-carrier purposes. The United States District Court is the duly constituted and appointed examiner to take the testimony and certify the same to the Commission for its conclusion. May the appellants thwart that provision in advance by attacking a tentative valuation?

The wisdom of the legislation is obvious. The Commission is the one central body which operates upon the transportation system as a whole. Courts function independently not only of the Commission but of each other. Differences of opinion may be limited only by the number of the scattered judges.

Even the same judge may entertain different opinions at different times. To sustain judicial review of all tentative valuations is the equivalent to an adjudication that there shall be no physical valuation of railway properties for common-carrier purposes.

VI.

CONCLUSION

The tentative valuation declared by the Commission is clearly not reviewable in the manner here undertaken and for that reason the decree of the District Court sustaining the motions and dismissing the bill should be affirmed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

NOVEMBER 12, 1924.

APPENDIX A

(*Ante*, p. 15.)

STATEMENTS OF MEMBERS ON THE FLOOR OF THE HOUSE, ACT OF MARCH 1, 1913

REPRESENTATIVE ESCH (Wisconsin), on December 3, 1912, speaking before the House in Committee of the Whole on bill 22593, said (Cong. Rec., Vol. 49, Pt. 5, p. 38):

Before considering the methods of securing a fair valuation of railroad property, it may be of interest to discuss the reasons why such valuation should be made and the increasing popular demand for it. Floy, in his recent work on Valuation of Public Utility Properties, states these, as follows:

(*a*) Monopolistic control has often been used unfairly to get large earnings at the expense of the public which granted the franchise.

(*b*) The growing conviction that because of unfair promotion, loose methods of financing, lack of proper maintenance of property, obsolescence owing to new inventions, capitalization no longer represents the real value upon which earnings should be based.

(*c*) Overcapitalization, due to ignorance, to willful, intentional, unwarranted increases of securities for immediate but unfair profits.

The pending bill empowers the Interstate Commerce Commission to secure the data and report the complete financial history of every common carrier. Such history will disclose more than one instance of intentional overcapitalization as flagrant as that of the Chicago & Alton in 1898. Such overcapitalization is unjustifiable on business as well as moral grounds. Nor can the complaints of the public, burdened by extra charges to meet interest and divi-

dends on excessive and unwarranted issues of securities be met by the cry of "vested rights." There is no such thing as a vested right to exact exorbitant charges on watered stock. The public under the law is willing to pay a fair return upon the "fair value of the property" used for its convenience. But the public which pays these charges desires and is entitled to know what this fair value is and how it should be determined and upon what it should be based.

The decision in *Smyth* against *Ames*, already cited, mentions a dozen elements which should be considered in arriving at "fair value," including "cost of construction," "amount expended in permanent improvements," "present as compared with original cost of construction," and indicates that "there may be other matters to be regarded in estimating the value of the property." As this bill deals primarily with physical valuation, I shall confine myself to a discussion of those elements, such as cost of construction, or reproduction new, and depreciations, which naturally are the bases for such valuation.

PHYSICAL VALUATION

Physical valuation, once determined, will aid commissions and courts, both State and Federal, in questions relating to: First, the fixing of reasonable rates; second, taxation; third, stock and bond control. As taxation of railroad property is left to the States, and Congress has not yet granted authority to the Interstate Commerce Commission or other agency to regulate the issuance of stocks and bonds, the valuation provided for in this bill will be to furnish the commission with one of the most essential standards for the determination of the reasonableness of rates—a standard for which the commission has appealed to Congress for many years. Many different bases for the determination of value, varying with the purpose in view, have been suggested, and some have been used in the different States and by various tribunals, among these the following: (*a*) capitalization, (*b*)

cost and book account of carriers, (*c*) earning power, (*d*) market value, (*e*) bona fide investment added to betterments and improvements, (*f*) cost of reproduction, (*g*) present physical value, and so forth.

* * * * *

We have tried to make clear that a physical valuation is not the sole element to be considered in arriving at the fair value of railroad property, but is one of the most important and practicable of all those specified by Justice Harlan in the *Nebraska case*. Original cost, amount expended for permanent improvements and extensions, the reproduction cost, and the same less depreciation and going value, according to Chairman Roemer, of the Wisconsin commission, all are to be considered and carefully weighed.

Such work has been done in the several States by commissions authorized to do it in connection with the power to regulate rates. These Commissions, when full powered, have accomplished beneficent results. They have prevented wasteful competition, which has so often proven a burden to the public. They have systematized accounting, prevented rebates and discriminations, improved service, stabilized values, and purified politics. The Interstate Commerce Commission, in its larger field, has performed a like service to the country. The additional power granted it by this bill will make it still more effective for good.

The railroads themselves in the earliest cases, including the *Nebraska case*, were the first to demand valuations of their property when making defense against rates imposed by the legislatures of some of the Western States on the ground that they were confiscatory. Now, however, when State commissions and Congress seek to make such valuations to aid in determining the reasonableness of rates, they protest for fear such valuations will result in a reduction of their rates.

Some high railroad officials feel confident that a fair valuation of the physical properties of the railroads

of the country will disclose the fact that they are not as a rule overcapitalized, and that the present average of $60,000 per mile will in the case of many trunk lines be exceeded by the valuations made under the provisions of this bill. Others, and perhaps the majority of them, warn the country that such valuation will result in a demoralization of securities, owing to a marked excess of the capitalized over the physically valued totals. I do not share these fears, but believe that a valuation made by officials of the experience, skill, and fairness we have a right to expect will be selected, will command the respect and approval of railroads and shippers and the general public.

In conclusion, the reasons for the enactment of this legislation may be summarized as follows:

1. As railroads are monopolies serving the public exclusively, and have in the past strengthened their control by rushing out competition, they should be subjected to such regulation as will entitle them to receive a fair return upon the fair value of their property. This bill seeks to provide a method of ascertaining such fair value.

2. If railroads will not or cannot furnish accurate data as to fair value, the Government must be given the power to make a valuation of its own.

3. The Hepburn Act of 1906 gave the Interstate Commerce Commission the power to fix rates and determine their reasonableness, but no standards were established as a basis for the exercise of this power. This bill, by specifically authorizing it to make a physical valuation, supplies it with one, if not the most efficient, standard.

4. The amended interstate commerce act of 1910, by still further increasing the commission's powers to include the suspension of a rate, or rates, or schedule of rates, pending a hearing, makes more imperative than ever the authority to make a physical valuation which shall supply the data for the proper determination of such hearing. While a single rate

or group of rates may not require such valuation to be made, the applications for advances of rates made by railroads from all parts of the country two years ago, many of which are still pending, clearly show not only the advantage but the necessity of fortifying the commission with the data obtained by such a valuation for the orderly and prompt transaction of the vast amount of business before it.

5. Although the Interstate Commerce Commission has not yet been given control over the issuance of stocks and bonds, the pending bill only authorizing an investigation of the financial history of the railroads, a physical valuation should precede the granting of such control. Capitalization should bear some fixed relation to such valuation.

6. In every strike of railroad employees and in the threatened strike of the engineers last summer and in the strike now threatened by the firemen on all lines east of the Mississippi and north of the Potomac and Ohio, the rates charged and the income derived therefrom are pivotal points in the controversy. The employees contend that the net earnings justify an increase of their wages. The railroads contend that the rates limited by the commission will not permit the increase demanded. A fair valuation, conceded to be such by the public as well as by the railroads and their employees, will be a principal factor in securing the speedy and satisfactory adjustment of such disputes. (Cong. Rec., Vol. 49, Pt. 5, p. 43).

Representative Madden (Illinois), on December 3, 1912, concerning the Committee Report, said (Cong. Rec., Vol. 49, Pt. 1, p. 55):

The people all over the country are looking forward to the time when everybody will understand whether a rate is reasonable or unreasonable. Up to the present time there has been no sufficient information given to the public to enable the public to understand whether the rates are right or wrong. Everybody believes they are wrong in most cases. The railroad companies' representatives throughout

the United States are constantly arguing for power to levy higher rates on the theory that the wages of the men employed by the railroad companies are much higher now than they used to be and the volume of work done by each man employed is much less, and that the total aggregate cost per ton of freight carried by the railroads of the country is greater than it ever was before, and that the dividends paid on the capitalization of the roads are much less than they ever were before. The question arises whether railroad rates should be based upon the amount of money to be earned to be applied to the payment of dividends or whether the rate should be made upon the basis of the actual value of the property of the railroads, regardless of whether the property is considered in a going concern or not. My own judgment is that where a railroad claims to be running at a loss and its capitalization is more than twice what it ought to be the question of gain or loss in such cases ought not to be taken into account. If the railroad rates are fixed on the basis of valuation provided by the first section of this bill, it looks to me that in some cases they will be fixed at much higher rates than they ought to be fixed at, because this bill provides that the commission should ascertain the value of the property for railroad purposes or for rate-making purposes, and then in the case of the railroad referred to by my friend from Pennsylvania (Mr. Olmsted), where it was required to construct expensive tunnels to get into Baltimore, if the rate were made on the basis of cost to that road in order that it might be able to earn dividends the earnings power of the railroad running in competition with it would be twice as much as it ought to be.

I believe that in many cases the values of railroad properties will be found to be greater than the actual capitalization of the railroad. But, on the other hand, I believe that in many other cases the values of the railroad properties will be found to be materi-

ally less. At any rate, whether it is higher or lower, the public is entitled to the information which this bill will enable the commission to obtain, and I am very glad that the time has come when Congress feels that the legislation demanded for so long a time by the people ought to be enacted into law.

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I now advance another proposition. It is neither expedient, just, nor economical to ascertain the values of all the railroad properties devoted to interstate commerce, and it will best subserve public as well as private interests if the investigation and valuation be by entire organized railway systems and limited to the important and dominating even among these. With all the light obtainable from every source, with a force of engineers, experts, and other helpers equal in number to the Standing Army of the United States at work all the time gathering and tabulating data, even if when assembled any finite mind could grasp it all, the question of what is a reasonable rate or a just and reasonable schedule of rates would still remain a matter of opinion and judgment. Compromise and the arbitrary striking of averages are an incident of all rate fixing. It is as impossible now to fix rates which in the future will pay all outlays and leave a definite sum for dividends as it would be to fix next year's prices for eggs or potatoes, and for almost indentically the same reasons. All those railway economists, whether holding professorships in colleges or seats in Congress or on the Interstate Commerce Commission, who expect to make or to see made of rate fixing an exact science or even susceptible of becoming subject to any definite rules or standards are doomed to disappointment. Nevertheless it is possible to fall into habits of thought and accept principles and standards which, being conformed to in practice, destroy public justice and deeply wrong

the freight-paying public. (Cong. Rec., Vol. 49, Pt. 1, p. 56.)

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The true rule is that if the public be well served at fair and reasonable rates, or rates fixed under really competition conditions, then there should be no reduction of rates so long as they produce only a reasonable return on the property. This rule of rate making compels the rate-fixing authority to begin at the shipper's side of the question and to only take up the carrier's side if that becomes necessary; that is to say, when it is alleged that fair and reasonable rates for the shipper are confiscatory of the carrier's property. It is no valid objection to rates which are only fair and reasonable from the shipper's standpoint that they are unreasonably low from the carrier's standpoint, because even unreasonably low rates may yield some profit, however small, and be therefore nonconfiscatory. What the courts and commissioners have done in recent years was to start the consideration of each question from the carrier's side; to start with this heresy that at all events, aside from all other considerations and regardless of the effect upon the fortunes of shippers, the carrier was entitled not merely to protection against a confiscatory rate, but to a return, usually placed at or a little above the rate of interest on mortgage loans. To give such a rule universal application is to guarantee not only the solvency but the financial success of the most recklessly, dishonestly, and wastefully managed roads in the contry, or those which but for the Government sanction thus given to exploitation of the public would have to go into liquidation and reorganize on a sound and honest basis. An exemplification of the practical application of this modern theory is seen in the *Spokane rate case*, where the commissioners decided that rates which satisfied the financial needs of the Northern Pacific and gave the holders of its enormously inflated stocks the dividends which they

demanded were just and reasonable, though the same rates in the case of its competitor, the Great Northern, yielded nearly twice the same dividend rate in addition to enabling it to pile up a large surplus for extensions and outside investments. (Cong. Rec., Vol. 49, Pt. 1, p. 58.)

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But in the case of what are known as the trunk lines, there is presented a striking and important illustration of results flowing from the adoption by the commission of the "constant-profit" theory of rate making. The rates of the Pennsylvania and New York Central, whose lines reach all the important business centers of the West, have been fixed exclusively by the railroad managements themselves, with no limitations whatever except with reference to what the traffic would bear. Their rates have never been examined or investigated by the commission as to their reasonableness or unreasonableness. It appears to have been considered entirely proper that the public should pay these companies considerably more for a given passenger service than is paid for the same service to the Baltimore & Ohio, the Erie, and certain other trunk lines. Now, it is undeniably true, a fact admitted by the railway managers at the rate-advance hearings in 1910, that a hard and fast agreement exists between all the trunk lines, and that they maintain a central association, or bureau, in New York City. Their combination would, however, be powerless to maintain unreasonable rates without the recognition given by the commission to the "constant-profit" theory. But with that recognition and adherence to their established practices, the associated trunk lines are able to exactly reverse the natural order and substitute self-interest for the interest and welfare of the public. If the economic law of competition were allowed to operate in trunk line territory the lowest rate between the East and West would be those over the most natural and direct and the best equipped routes—that is to say, over

the New York Central and Pennsylvania. They have eliminated all difficult grades and curves, duplicated trackage, acquired terminal facilities, and provided themselves with superior motive power and rolling stock until they can move a given tonnage over a long distance at less than one-half what the same would cost over other and inferior roads.

By acting secretly in concert and by constant readjustment and classifications of rates, thus working them up from one level to another, they have escaped entirely the regulative powers of the commission and become a law unto themselves. The commission could not now, under existing law, even if so inclined, examine and pass upon the rate question in its application to the whole trunk-line situation and establish in trunk-line territory a system of rates. Indeed, Congress has heretofore, unwisely, I think, withheld from the commission any such power. Without it it is idle to talk about any general rule for ascertaining the reasonable rate, and the rule of a constant profit for the carriers, in addition to being destructive of all other interests, is a pure invention to serve the selfish purposes of the railroads. (Cong. Rec., Vol. 49, Pt. 1, p. 59.)

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We are disadvantaged by our environment in the very midst of events constantly transpiring all round us in the world of railroad construction, finance, and operation. Transportation of persons and property are interwoven with our everyday affairs and our very existence, so that we have failed to see the trend and drift of the matter, or to discern the final solution of the problems presented to us. The figures representing the present financial status of the railroads mystify us by their magnitudes. We can only understand their significance by comparisons.

The present capitalization upon which we are paying interest and dividends by way of rates and fares is, according to the latest report of the Interstate Commerce Commission, eighteen billions of dollars.

In so far as this vast sum represents actual investment, it is for the most part investment made by the people who use—and who have no choice in the matter—the facilities provided, comparatively few of whom own any of the stocks or bonds. Yet the holders of these are constantly referred to as investors whose investments must be safeguarded against any diminution of returns which have gone on increasing proportionately as their property has been added to by accretions from collections which their patrons had no option but to pay. (Cong. Rec., Vol. 49, Pt. 1, p. 59.)

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The provision of the committee bill injecting the subject of stock and bond issues into the scheme of valuation is one which, in my judgment, is fraught with mischief. It imposes upon the commission a useless if not in fact an impossible task. But the strongest argument against it is that it carries with it an assumption that the Government is under some sort of obligation to the carriers with respect to their internal finances and private relations to the holders of stocks and bonds. An inquiry, such as is provided for in the bill, as to the minute history of every issue of railroad stocks and bonds is one from which a commission composed of many members and provided with unlimited revenues might well wish to be excused. It appears to me as impossible as it is useless; and if the expenditures by the commission during recent fiscal years when it was engaged in only its routine duties may be accepted as an indication of the cost of the work directed by the bill to be done, we would do well to give that phase of the subject our most serious consideration. The estimate of cost given by the commissioners are mere guesses and not very shrewd guesses at that. It will take several years to obtain the data, and at the end of that time it will be fit only for the junk heap. So many changes will have occurred that the data would afford no satisfactory light on any question properly before the commission, even if it could ever be placed in manage-

able form. None of the commissioners nor any member of the committee was able at the hearings or is able now to suggest any definite use for the outcome of all this labor and expense. I do not deny the power of Congress to obtain all the information specified in the bill and to spend all the money necessary to obtain it. But I look upon the theory of rate making underlying it as peculiarly and stupendously vicious. (Cong. Rec., Vol., 49, Pt. 1, p. 60.)

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The railroad managers and representatives earnestly and even persistently cultivate in the people those hopes and fears which make for corporate enrichment and popular loss. To them and their activities more than to aught else is due that morbid appetite for commercial conquest which has led to a wasteful exploitation of our diminishing natural resources. If a few square miles are found remote from railroad lines, the residents of that area are soon convinced of their complete isolation from the balance of the world and made to believe that the only thing needed to insure them plenteous prosperity and content is the advent of a railroad. And urban populations are in divers ways and through various channels and instrumentalities of false construction convinced that any legislative interference with railroad extension is a dire menace to progress, and that the financial conditions of the railroads, reflected in earnings and dividends, is the true barometer of general business, and that a showing therein of a large balance in favor of the railroads constitutes the mainspring of universal as well as individual prosperity. Much that is promulgated on this subject begs the question and ignores not only the presence in the statute books of the interstate commerce act but also the public duties of the carriers.

With a view to promoting general prosperity the carriers would compel large contributions from the purses of rate payers to those who in the opinion of the

railroad economists are best qualified to bring about and maintain it by the circulation of money that such extensions would require. The railroad corporations dominate all other business, in addition to having absolute dominion over their own, and often rob particular sections of the country of the advantages which would naturally belong to them by reason of water transportation or otherwise, and the brazen claim is now made that their demand for high rates should be sustained in order that the shortest through route to general prosperity is by way of increased employment for labor by them, to be paid from large surpluses, only possible if high rates be charged and collected. (Cong. Rec., Vol. 49, Pt. 1, p. 61.)

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Much has been said about a claim of great and prosperous lines to enjoy, in form of greater profits, the rewards of superior engineering foresight and managerial ability. It is said that such a great institution should be conceded an organization value in the establishment of rates. Those who make that claim will regard as presumptious any attempt to answer this plausible claim, appealing as it does to our natural inclination to applaud those who have achieved success in any pursuit or line of activity. But that the claim is superficial and utterly destitute of merit is not so difficult to demonstrate as it seems to be upon first impression. In the first place it entirely ignores the distinction between private and public service. It must be borne in mind that recognition for this claim is presented at the bar of the legislative body of the Nation and consideration is asked for it as a feature of the pending bill. It is therefore to be treated as a claim preferred for recognition at the hands of the general public, and as such I will examine and discuss it.

In the first place, it entirely ignores the distinction between private and public service. Men devote superior talent and industry to the public on the same terms and subject to the same sovereign powers as they devote talent and industry of mediocre and

inferior quality, or as one devotes more and another less of capital. In the second place it is impossible to find any deserving recipient of any reward that it might, upon this new theory be proper to bestow. No man living, nor the descendants of any that have died, are entitled to compensation in any form for projecting, for instance, the New York Central as it was projected. In addition to the fact that the original promoters and builders quickly pocketed great fortunes by manipulating the stocks and bonds, and not by superior public service, is the fact that they enjoyed the favor and aid of State and municipal authorities without which their enterprise and foresight would have availed them nothing. In the third place, speaking now with reference to the present active managers, there is no basis for any claim of superior management. But assuming that the management is excellent, it is a safe assumption that all in a supervisorial capacity are in the enjoyment of adequate salaries. Then we have the corporation itself, the nonsentiment figment of the imagination which need not be considered aside from its stockholders. And as to the latter, the question of why their dividends should be rendered constant and secure by action taken by the Government has not been answered and will remain unanswered. Finally, as for the claim of the New York Central and other such companies based on superior management, it does not appear that a well constructed, highly improved, and thoroughly equipped railroad is any more difficult to manage, or even as difficult, as one of a different kind. Of all mechanical appliances that used in the transportation of persons and property from place to place is the simplest, involving a comparatively low degree of mechanical skill.

Of course, a railroad system is complicated in its entirety, as would be a great department store, but the task assigned to each man is simple. Again, transportation considered apart from its instrumentalities is too important a function to come under the absolute unsupervised control of any person or persons, either in an individual or privately

organized capacity. It is to modern life what chemical forces, gravitation, and motion are to the earth. It is the one thing that makes production worth while and exchange possible, as the recurrence of the seasons causes vegetation to grow and the fruits of the fields to multiply. Therefore, these great conquests of the wilderness, these great advances of civilization, for which so much credit is claimed for individuals and corporations, were the mere applications of forces which belong to the whole people. Those in control temporarily of these powerful instrumentalities are the mere accidents of a day. Their achievements were not attributable so much to their superior business sagacity as to popular tolerance, credulity, and optimism.

The railroads are now claiming that rates should be maintained or increased so as to produce surpluses beyond a fair return on existing capitalizations in order to sustain the credit of the railroads. In other words, they expect Congress, the President, the Interstate Commerce Commission, and everybody having anything to do with regulation to depart from all fundamental principles governing railroad rates and set up a new rule, a rule which, while leaving the control of stock and bond issues, as well as the financial and operating control, exclusively in private hands, would impose the duty first upon Congress and then upon the commission, and ultimately upon the people to insure a market price for stocks and bonds such as will facilitate the borrowing of money and steady the market for stocks and bonds. To all familiar with the subject, to all who have in mind the public interest, the proposition is absurd and preposterous on its face. It would impose a task which, even if supportable on any just principle, would be impossible to perform, even though all the constitutional powers of the Government were fully exerted. (Cong. Rec., Vol. 49, Pt. 1, pp. 62, 63.)

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The present law amounts to just this: The carriers shall deal fairly by the public, and when a question

of fairness or unfairness is raised the commission shall sit as an arbitration board with full powers in the premises. The reports in the rate-increase cases fully support this view. I understand from these reports that the value of property devoted to the public use, even if any satisfactory proof of it had been made, would have constituted only one of many important elements in the case. And I infer from the language of both Lane and Prouty, commissioners, that if the railroads had made strong showings as to revenue requirements many of the proposed increases would have been allowed. Be that as it may, it is a fact, one which should arouse serious concern, that the railroads are now engaged in the preparation of a valuation of their properties to be used in making up a case upon which the commission can not reasonably prevent further increases in their rates. So the issue before the commission between the carriers and the public has been within two years converted from one raised by shippers demanding a reduction of rates to one now raised by the railroads for an increase. Though widespread protest, amounting almost to a popular uprising, stands in the way of a wholesale increase, practically the same end may now be reached gradually, covertly, and in detail, and without attracting public attention. (Cong. Rec., Vol. 49, Pt. 1, p. 65.)

Representative Campbell (Kansas), on December 3, 1912, concerning the Committee Report, said (Cong. Rec. Vol. 49, Pt. 1, p. 66):

Two results should follow the ascertainment of the valuation of railroads: First of all, a regulation of the issuance of their stocks and bonds. The gentleman from Illinois (Mr. Mann) closed as I would begin, if I had the time, with a discussion of one of the most vital subjects connected with this matter—the issuance of stocks and bonds of common carriers. Every investor ought to know, by the valuation of the property, what his stock is worth. He ought to know the amount of stock that has been issued, the

amount of bonds that have been issued, and by that be able to place some value upon the property that he has purchased. Then let the manipulators manipulate. Then let the stock gamblers gamble. If the investor who owns the stock does not see fit to throw his property upon the market for sale, it will still represent a value based upon the actual value of the road.

The time is coming when investors will be found in every part of the country who will purchase stocks of the transportation companies of the country, and that sort of investment should be encouraged.

The stock of transportation companies ought to be made a safe investment for every person who has the money to invest.

It ought not to be a speculation or perhaps, more properly, gambling. The matter ought not to be left to the manipulators who sometimes gamble in the price of the stocks of railroad companies. This has been done and no doubt will continue to be done until either the State where the gambling places are operated or the Nation that controls interstate commerce shall find a way to put a stop to that species of stock manipulation and gambling. The day is past when promoters should have the right to fix the amount of either the capital stock or the bonded indebtedness of railroads without limit or check upon them.

The bill therefore ought to be completed by providing for a control of the issuance of stocks and bonds of these companies, based upon the valuation as found by the commission.

Representative Cullop (Indiana), December 3, 1912, following the reading of the Committee Report, said (Cong. Rec., Vol. 49, Pt. 1, p. 48):

Mr. Chairman, the purpose of this measure is to ascertain the physical valuation of the railroads for the purpose of preventing impositions on the public in the sale of capital stock, bonds, and the fixing of transportation charges.

There can be no question that there is a demand for such legislation, and the object of this bill is to satisfy that demand.

Railroad rates are to-day fixed in a manner which is absolutely unjust to the ultimate consumers and the shippers of the country. Transportation rates are fixed on three items of consideration as the basis, first, to pay operating expenses and improvement charges; second, to pay interest on the bonded indebtedness; and, third, to pay a reasonable dividend upon the capital stock. The first basis is just. The second is absolutely wrong, and if the second and third are both employed, as is now done, they constitute a double charge upon the shipping public which must be paid by the ultimate consumers of the country and thereby constitutes a burden on them. It is not fair to charge a rate that will make a sufficient earning to pay the interest on the bonded indebtedness and a dividend on the capital stock. Either the money raised by the bonded indebtedness went into the pockets of the owners of the railroad as a net profit or it was invested in the construction and equipment of the road. If, therefore, a rate is charged which will create earnings to pay the interest on the bonded indebtedness and also a dividend on the capital stock—which more than covers every dollar of bonded indebtedness—such a basis necessarily constitutes a double charge. For that reason the present basis of fixing railroad rates in this country is absolutely erroneous and gives the owners an unjust advantage over other business enterprises.

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Again, it is a well-known fact that there is an overcapitalization of nearly every railroad in the country. The capital stock, as a usual thing, is more than double the actual cost of the building and equipping of the railroad. In many instances not only is the capital stock double the amount of the bonded indebtedness but sometimes three or four times the value of the road, and in many instances the bonded indebtedness, the mortgage indebtedness,

of the railroad is greater than the actual cost of the building and equipping of the road itself. So that, therefore, to charge a freight rate and fix it on the basis now employed enough to pay the interest on the bonded indebtedness and a dividend on the capital stock is an outrage against the ultimate consumers of the country. It is this manner of fixing rates as now employed in this country, this manner of fixing transportation charges by the great common carriers of the country, which retards the development of the country and prevents the full realization on investments in other industrial enterprises.

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There is another thing about this bill that ought to be considered, and that is that it will to a large degree, if not altogether, stop the overcapitalization of railroads and the overbonding of them. It will stop the imposition which to-day and for years has been practiced, the abuse of selling watered stocks and inflated bonds to innocent purchasers. I am aware of one argument that will be made against it, and that is that these stocks have passed into the hands of widows and orphans of the country and superannuated preachers. I take it that that argument is not sufficient in the mind of any gentleman upon this floor to oppose the passage of such a measure as this. If such people have been unfortunate in their investments, they must stand upon the same basis with other people who have been likewise unfortunate. But it is not fair to 90,000,000 of people that they should be required to pay unjust and enormous transportation tolls and have the development of our country restricted in order that the investments of a few may be made safe and good. Better it would be that Congress would appropriate the money to make restitution to them than to impose upon 90,000,000 of people, as is being done now in the fixing of transportation rates in this country, and retarding the commerce of a great

country. It would be cheaper to the people in the end.

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It is the object of this bill, according to my understanding, that the capital stock and bonded indebtedness should have nothing whatever to do with the fixing of the railroad rates in this country. It should be the policy of the Government that private business is never to be guaranteed; and if the owners of railroads make bad investments in their business methods, make extravagant purchases, and the construction of the roads is imprudently done, then the innocent public should never, as a matter of common justice, be taxed to make up for the errors of any man's business judgment. It is not right as a public policy, and it is not the intention, I will say to the gentleman, to let the bonded indebtedness or the overcapitalization, the creation of great financiers, those engaged in high finance, be the subjects for the plunder of the innocent people of the country or to retard the development of the greatest country on earth, as is now being done. In every line of business men suffer for their own mistakes in judgment and not the public. (Cong. Rec. Vol. 49 Pt. 1, p. 49.)

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Mr. Chairman, the term "confiscation" has been used as a scarecrow in this country for more than a quarter of a century. It has been made do overtime. Why should the Government guarantee anybody's private investment? It has no more right to do that than to guarantee the investment of a man in his farm, in a store, or in a factory.

Yet it is proposed by some that when a man undertakes to build a public utility, building it for making profit, for earning money on his investment, the Government ought to step in and permit him to fleece the public in order to make his business successful. Such a proposition is indefensible, and whenever presented it should be rebuked. Governments were instituted for the benefit of the governed

and not the governed for the benefit of the governments. Courts should uphold, if it can reasonably be done, the will of the people as expressed by their lawmaking powers, and the principle involved in this measure is not repugnant to the rule of our courts so far expressed on similar questions.

To-day, under the method in which railroad rates are levied, the basis employed, there is not a railroad in the country that can lose money if it employs intelligent business methods. If it does not earn profits, it is because of its bad business management. Against this no legislation could safely be enacted which would assure good business management. (Cong. Rec., Vol. 49, Pt. 1, p. 49.)

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Certainly he could. Now, let us look at the origin of the present system employed. Fifteen years ago there started in a movement for legislation to make just such a thing as we have now constructed the basis upon which rates should be levied. Railroad companies increased their capital stock three, four, and five hundred per cent without adding values. Why? Because it was to be taken as the basis for earning dividends for them on the amount of capitalization. It was a well-directed and well-conceived plan to get exorbitant rates—dividends on watered stocks, on fictitious values. There was a well-directed plan to get at the basis which is now employed, and with that purpose in view the railroad companies began to increase their capital stock without additional investment of any consequence until they increased it in many instances more than three hundredfold. What was the result? Then they began to bond, and many of the best railroads of the country to-day are bonded for more than enough to build and equip them. What was the object in all of this? The object was to increase earnings, and not to improve facilities. It is the only institution so far known which earns a profit on its indebtedness. Indebtedness is always loss, but here is an instance in which indebtedness is a great profit to the trans-

portation companies. Such has been the method all along the line in the regulation of this great business. (Cong. Rec., Vol. 49, Pt. 1, p. 49.)

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It is not fair to the public that it be taxed to earn dividends on watered stock; that freight rates be fixed at such price as to pay dividends upon watered stock that cost the railroads nothing. When such a procedure is permitted, nothing is turned into value and millions are made by such a policy which have never been earned. Such a policy is unjust and unfair. This bill will in a very large measure eliminate that system and will to a certain extent wipe out the system of high financing in this country by which the innocent public is exploited so often. That is one of the objects of it, and the country will approve it. (Cong. Rec., Vol. 49, Pt. 1, p. 50.)

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It is unfair to the public that the Government should guarantee the investment in stocks and bonds, and yet that is the effect of the present system. If the stock and bond speculator wants to go on the market and speculate, the Government ought not to guarantee his investments. Who ought the Government to protect? The producers and consumers, and not alone the speculator who thrives by the manipulation of the stock market. The speculator is taking his chances in the mad race of speculation. Should the Government throw its strong arm around him and protect his chance speculation at the expense of the innocent producer and the helpless ultimate consumer of the country, or should it protect the one who earns his living by the employment of his muscle and mind? That is the proposition involved here. For me, I want to stand by the producer; I want to help the helpless consumer of this country and not the stock speculator who takes his chances on the opportunities of trade of this country, because he is not so deserving as the other, whoever he may be. It would give a great impetus to every manufacturing industry, to

every mining industry, to every farmer in this country, and it would multiply the productions of the farm, factory, and mine, and the cheaper products which now go to waste could be put into the markets of the world where there is a demand by the ultimate consumer, and it would thereby help all. (Cong. Rec., Vol. 49, Pt. 1, p. 50.)

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I may state to the gentleman from Illinois that the theory of this bill is that the physical valuation of the properties shall be determined irrespective of their capitalization and their bonded indebtedness, and the rates fixed upon that, so that there will be no inducements to the overzealous speculator of the country to rush in and buy watered stock or inflated bonds. (Cong. Rec., Vol. 49, Pt. 1,p. 50.)

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There is another proposition which I want to call to the attention of the committee. These companies give one valuation for purposes of taxation, to raise public revenues, and then an altogether different valuation of the property to the Interstate Commerce Commission for the basis of charging the public for service to earn revenues from the public, which all, I take it, will concede to be unfair to the public. If the roads fix one value for taxation, why should they not be bound by the same valuation for the fixing of service charges. If it is fair that they should be taxed upon a certain valuation, then it is also fair that the public should be taxed on the same valuation for the transportation services performed. I do not believe any man will deny that proposition.

The question involved in this legislation is of vast importance to the public and upon the result depends much the conditions which shall follow, whether it shall retard or accelerate the development of our country and inspire the prosperity of the people. Common carriers render public service and should be regulated to the end that the country should be benefited thereby.

We are living in an age of wonderful progress and evolution of the times produces marvelous strides in the development of every human activity. More is being done daily and more is required to be done to aid every agency human ingenuity can employ to facilitate the progress of the times so essential to secure the contentment and happiness of the people and to inspire and accelerate the prosperity of our country. Legislation to this end is demanded in order that the requirements of public weal may be assisted and public wants supplied for the promotion of the common welfare and the general benefit of the entire public. (Cong. Rec. Vol. 49, Pt. 1, p. 51.)

Representative Borland (Missouri), on December 3, 1912, concerning the Committee Report, said (Cong. Rec., Vol. 49, Pt. 1, p. 52):

We have come to a time when the question of the physical valuation of railroad properties is an absolute pressing necessity. We have come to a time when the conditions are ripe for such a physical valuation. The speculative age of railroad building is probably at an end in this country. A generation or a generation and a half ago all the great West was eagerly bidding for railroads. Land grants, aid bonds, public subscription of stock, anything on earth was offered to get a railroad out there in a country that could not produce the business that justified a railroad when it was first built. Now all of those railroads have been built. They were cheaply built; many of them built entirely out of land grants or aid bonds, and yet stocks and bonds were put upon the market based upon such properties. In 1893 came a period which was a clearing house of all these western railroads. Almost without exception they went through a period of receivership and all scaled down their indebtedness and all wiped out public stocks and bonds and all control the public had over the management, and they all consolidated great systems. Then they began to rebuild out of the

earnings and capitalization of that property an entirely new and adequate system of transportation throughout the West. But now the period of railroad speculation is almost at an end and a period of railroad operation has come when the roads are putting in heavier rails, straighter roadbeds, broader ties, better bridges, double tracking in most cases, running bigger trains, heavier engines, and fewer men to the train crew.

APPENDIX B

(*Ante*, p. 21)

STATEMENT OF SENATOR LA FOLLETTE, ON THE FLOOR OF THE SENATE, ACT OF MARCH 1, 1913

SENATOR LA FOLLETTE (Wisconsin), on February 24, 1913, requested that the Senate, as a Committee of the Whole, ask consideration of House Bill 22593. (Cong. Rec., Vol. 49, Pt. 4, pp. 3793, 3794.) Concerning the bill Senator La Follette stated (Cong. Rec., Vol. 49, Pt. 4, pp. 3796, 3797):

(1) THE ORIGINAL COST TO DATE

Existing railroads have actually been built up through a series of years. The construction has been piecemeal and has advanced with the growth of the business. The original cost to date will, at every stage of construction, take account of the prices paid at the time for property, material, and labor, the amount of money paid out for legal services, engineers, architects, designers, management in organizing the corporation and constructing the road.

I digress just a moment to say, Mr. President, that in ascertaining the value of one of the public utilities of Wisconsin our commission carried its work over a period of 40 years. It found one case where there was manifestly a job perpetrated upon the public where one contractor was allowed $3 a day for labor employed, when the going price of labor ascertained by the commission as prevailing at that time was $1.50 per day. They did not allow the $3, which was an imposition upon the public, but permitted only the actual value of the labor at that time to be charged up as a part of the capitalization of the road. That is what the tracing out of the original cost to date will mean on every one of these properties.

I can understand how the question will at once be raised in the minds of Senators as to the difficulty, particularly with respect to many of these older roads, of ascertaining these facts; and you will find the opinion expressed by theorists upon the subject that to do so is impossible. But we have had in Wisconsin—they have had in the State of Washington and in other States—an experience that contradicts these theories. It is possible to ascertain this original cost.

In case of the gas plant in the city of Milwaukee, although the books did not furnish the figures, the cost of all the materials entering into the construction of that plant was determined as of the time. It simply requires industry and thoroughness on the part of the commission charged with the responsibility. And in no other way can the public ever be informed of the exact amount actually invested by the carrier, excepting by establishing the original cost to date.

The original cost to date will also show the exact amount received from the sale of stocks and bonds, and, if the bonds have been sold at a discount, the price realized and all the expenses of brokerage. It will show the amount paid in by stockholders. If stocks or bonds have been issued for property instead of cash, the value of the acquired property will be ascertained. If the present corporation has acquired the property or any portion thereof at less than its physical value, or through some form of manipulation or combination or deception to the public, with a view of strengthening its monopoly character and increasing its prospect for excessive value, or if its expenditures do not represent reasonable expenditures which ordinary business management would not have approved, all of these facts will be disclosed by ascertaining the original cost to date, and the matter will be dealt with by the court when it comes to pass upon that question. The Supreme Court has already in one notable case, the Stanislaus case, rejected excessive costs and manifestly extravagant expenditures made by the

corporation, and denied their right to capitalize those extravagant and corrupt expenditures against the public. It will be for the commission and the courts to determine to what extent, if at all, such investments will be allowed to be capitalized as against the public for rate-making purposes. In short, the original cost to date will show the true investment.

* * * * *

(2) COST OF REPRODUCTION NEW

This will show the exact cost of reconstructing the property in all its parts at existing prices.

There is a contention to-day by the owners of public utilities and by those representing all common carriers that "cost of reproduction new" is the true basis for the fixing of rates. I myself do not agree with that view. While this cost was once accepted—and the Supreme Court is still frequently quoted as in favor of cost of reproduction new as an element which must be considered in the fixing of rates—with every decision that comes from State courts or from the Supreme Court of the United States it becomes more and more a diminishing element in ascertaining the fair value which is to be used for rate-making purposes. But since there is still a contention that it is an element to be considered, and since there is recognition of it in the decisions of the Supreme Court, not yet eliminated, it is included in this bill. (Cong. Rec., Vol. 49, Pt. 4, p. 3797.)

* * * * *

"Present value" is not a safe term to use without extended definition and qualification. The danger of employing it without limiting its application lies in its current use by engineers to mean the earning power of a public utility. And the earning power of a public utility is based upon existing rates. Values based upon existing rates aim to justify existing rates. Hence the very purpose of determining the present value would preclude any reduction in rates and lead to reasoning in a circle. The bill provides for

separate ascertainment of original cost to date, the cost of reproduction new, and the cost of reproduction less depreciation. We simply get all these elements of value and label each one of them. (Cong. Rec., Vol. 49, Pt. 4, p. 3797.)

* * * * *

As stated, Mr. President, the cost of reproduction new will show the exact cost of reconstructing the property in all its parts at existing prices. While this may be regarded as a classification of diminishing value, it is contended that it is entitled to consideration in ascertaining the value of the physical properties of the carrier, and that contention is recognized by some commissions and some courts. It is therefore included as a separate classification in the bill.

(3) THE COST OF REPRODUCTION LESS DEPRECIATION

This will show the exact cost of reproduction in existing condition. This cost is arrived at by taking the amount of depreciation which has occurred in every part of the property since it was laid down or employed in the public service. This is an element of value so generally considered essential by commissions and courts that the wisdom of establishing it will not be questioned. That is, the commission will determine the cost of the railroad as it is to-day. Certain portions of the property are new and have just been put in; others are well worn. All those elements will be carefully scanned and their value taken account of, so that when this item of value is returned we will know what that property is worth as it stands to-day. (Cong. Rec., Vol. 49, Pt. 4, p. 3797.)

* * * * *

(4) OTHER VALUES AND OTHER ELEMENTS OF VALUE—THAT IS, INTANGIBLE VALUES

There is contention as to what intangible or whether, in fact, any intangible values should be included by a commission or rate-making body in assembling the values to be made the basis of the fair value upon which rates shall be fixed. The claim is

made in behalf of public utilities that going value, good will, and franchise value should all be ascertained and capitalized. Going value is the cost of developing the business organization of a common carrier after the physical property has been completed. After you have constructed the road, put on the rolling stock, and are ready to begin operating, an expenditure of money is required in establishing the business before the common carrier begins to pay reasonably fair returns on the capital invested. The amount so expended measures the going value. If there is an intangible value that can be rightfully incorporated in the values to be considered in the making of fair rates, it is this one of going value. It is ascertainable. Where they have kept their books honestly and fairly the books will show the exact expenditures.

When you come to the next intangible value, good will, my own opinion is that it is an intangible element which should not be included or considered by the commission in determining the fair value of a common carrier as a basis for rate making. Good will is an expenditure made to take business away from a competitor. Good will implies the existence of competitors furnishing the same product and selling it in the same market. The customers of a common carrier have no freedom of choice, because the common carrier is a natural monopoly and the public has no option of dealing with it in case they are dissatisfied. They are bound to use the common carrier even though it earns their ill will instead of their good will. (Cong. Rec., Vol. 49, pt. 4, p. 3798.)

* * * * *

In ascertaining the cost of reproduction new there is no actual construction. It is a theoretical value determined from the estimate of engineers, based on reproducing the property at present prices of labor and material. That is all it is. It does not take into account anything else. Of course, in getting the value of the actual construction of a road the interest on any capital lying idle under reasonably

good business management would have to be taken into account as a proper expenditure, but this element of value does not appear in getting the "cost of reproduction new." It is an item of value which would be taken account of in determining the "original cost to date." (Cong. Rec., Vol. 49, Pt. 4, p. 3798.)

* * * * *

I will say to my friend from Kansas that every item of expenditure will appear in "original cost to date," and I think it is proper that it should, because it is right for the public to know just how much money has been invested in the property of the common carrier; and it is further right that it should be known just how much of that has been invested by the common carrier itself and how much by the public. The "original cost to date," together with the financial history of all the transactions of the common carrier provided for later in the bill, will give to the public that information.

But to conclude as to these intangible values. The elements of value which will finally constitute fair value for rate-making purposes are steadily narrowing. They are not expanding. No decision by commission or court will stand which is ultimately found to be unfair to the public or to the common carrier.

The third subdivision of section 19–a requires the commission to ascertain and report separately the property held by railroads for purposes other than those of a common carrier. This subdivision and likewise the fifth, which relates to grants and donations and aids and all that, will furnish information that in some aspects will be useful to the commission and to which from every point of view the public is rightfully entitled.

Now I come to the paragraph to which the Senator from Alabama directed my attention.

The fourth subdivision of section 19–a relates to the financial history of the common carrier, and covers

all transactions material to the ultimate purpose for which this bill is enacted.

* * * * *

The terms of this fourth subdivision are plain and do not require to be defined. When the commission has complied with its requirements and reported to Congress, we shall be advised of all the financial operations of every common carrier. Whenever there has been a juggling of the stock and bond operations of a common carrier, with a rake-off to insiders, all of the facts will be laid bare. An important element of this provision is that requiring the commission to report upon the expenditures of all moneys received by the carrier and the purposes for which the same were expended.

The president of the Pennsylvania Co. testified in the *Advance Rate cases*, decided in 1911, that since 1887, when the Interstate commerce act went into effect, his company had expended on the Pennsylvania Railroad lines east of Pittsburgh $262,000,000 from earnings. During all of this time this company has collected in rates from the public enough to maintain its property, meet operating expenses, pay handsome dividends on all its stock, and besides has exacted enough more from the public to accumulate an enormous surplus. Out of that surplus the Pennsylvania Co. has expended a sum equal to nearly two-thirds of the total cost of the construction of the 2,123 miles owned by the company. That surplus, I believe, is wrongfully taken from the public, and I believe that ultimately common carriers will not be allowed to capitalize it against the public.

In discussion of the subject on another occasion before the Senate I presented a table showing that 31 railroads had within a period of five years paid for permanent construction out of surplus profits exacted from the public amounting to more than $350,000,000. Thus out of surplus they make extensive improvements and investments for which they should contribute new capital. Then they capitalize these investments and improvements, wrongfully accumu-

lated out of the profits on excessive rates, and in turn make this the basis for charging still higher rates. It is high time that this whole subject should be carefully investigated. The public has a right to know exactly how much has been invested in railroad property, and it likewise has a right to know how much of this investment was contributed by the owners of the roads and how much by the public.

The railroad corporations engaged in interstate commerce have not been and are not now regulated as to reasonable rates, for you can not ascertain what a reasonable rate is until you know the value of the property employed in the business; and after 26 years we are now about to ascertain the value of that property and establish a standard for fixing reasonable rates, if we pass this bill. But during all the time that has intervened for 26 years the carriers have gone on exacting from the public what they chose, taking enough to pay operating expenses and to meet maintenance. That was proper. In addition they have taken enough to pay interest and dividends—and that was right, provided they were not paying interest and dividends on fictitious capitalization.

And then, besides that, they have taken from the public hundreds upon hundreds of millions and put it into surplus, using that surplus to construct new lines, to build great and expensive and palatial terminals all over this country. Then they have capitalized those new lines and those terminals, assessing the public for the money which the public has put into the business.

Mr. President, I do not believe that is going to be permitted in the end. We are just approaching this big question. This bill does not attempt to settle the issue involved in the capitalization of surplus expended in permanent improvements and in construction.

The amendments in the succeeding paragraphs of the bill relate to procedure and are designed to make the original purpose of those paragraphs more definite

and certain of administration. Under the terms of the House bill whenever the commission completes the valuation of the property of any common carrier it is required to give notice and grant a hearing thereon to such carrier, with a view of making any necessary corrections before such valuation becomes final. The Senate committee amendment designates such completed valuation as "tentative" for the time being, and provides that notice shall be given not only to the common carrier but also to the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe.

That will give the commission an opportunity to send notice of valuation to boards of trade and shippers' associations in the territory covered by the valuation, so everyone who is interested can appear and be heard. The Attorney General would represent in a broad way all the public, and any governor can direct the attorney general of any State through which the lines run to protest against or be heard in favor of the valuation.

If no protest is filed, the valuation becomes final—that is, final to the extent that it is prima facie evidence whenever a rate case arises. Upon protest being made, the commission, after hearing all the testimony, may correct the tentative value if found to be erroneous in the light of all the evidence presented. Then that becomes the final value and prima facie evidence of the fair value of the property of the common carrier in issue.

After the final value shall have been thus established, in any proceeding to fix rates under the interstate commerce act this final value may be assailed before the commission by the carrier or by any interested party for the public or any association of shippers.

In the event that an appeal is taken from the order of the commission fixing rates and such appeal involves the final value of the property of the carrier

as fixed by the commission and upon the trial evidence shall be introduced regarding such value, which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, amend, or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order. (Cong. Rec. Vol. 49, Pt. 4, p. 3799.)

* * * * *

The order referred to is the order which the commission entered in the proceedings to fix rates. It is assumed that the rates would be related to the value of the property of the carrier. If the carrier or any party interested for the public on the hearing of the appeal before the court offers new and material evidence as to the value of the property, evidence which might, for example, cause the rates fixed by the commission to be held by the court to make the rates fixed in the order of the commission confiscatory, or, on the other hand, so high as to be unjust to the public, the commission should have the opportunity to consider this new evidence as to the value of the property and modify its order if, in the judgment of the commission it ought to be modified. And this

provision of the bill is for the purpose of preventing the delay incident to having the case tried out—even to the court of last resort, it might be—on evidence as to the value of the property different from that heard by the commission when it passed upon the proceedings in the first instance.

Mr. President, out of 32 cases tried by the commission which were appealed to the Supreme Court up to 1906—when I went over the records very carefully at the time the Hepburn bill was pending here—26 of the 32 cases were reversed, because the railway companies withheld important testimony upon the hearing before the commission, offering it instead when the case was heard on appeal before the court. (Cong. Rec. Vol. 49, Pt. 4, pp. 3799, 3800.)

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The Senator will notice in line 20 they are required to report in detail, and they are also required to analyze their costs. I will say to him that wherever there has been an ascertainment of the original cost to date, in so far as I know anything about it, they have gone into every item, and their cost sheets show everything of that sort. The trouble with attempting to enumerate what they shall do, to fix a limitation, is that if you say that they shall make statements about improvements under that they probably would not be required to go into detail about anything else except improvements. There are many items of the original cost that would not be covered by improvements, and I think there would be a danger in making any attempt to list and specify there unless you are certain that you were covering every single item of expenditure.

Mr. BRISTOW. There is one point I wanted to bring out in regard to that feature of the bill that requires the commission to ascertain the cost of production new. Such a finding, in my opinion, is not of any great value, so far as the rate making is concerned. It is a vacillating quantity; it does not represent in any sense the investment of the company in the con-

struction of the road. To illustrate: In a suit that was pending the estimated cost of the reproduction of the Northern Pacific Railroad was involved. I am informed the same engineer reported in 1907 and in 1909 as to the cost of reproduction new, and the value fixed in 1909 was $185,000,000 more than the same engineer fixed the value of reproduction new in 1907.

Mr. LA FOLLETTE. That is a difference of 25 per cent.

Mr. BRISTOW. It is a difference of 25 per cent in two years as to the cost of reproducing new the railroad. That did not have anything to do with the investment which had been made in this property, and it seems to me that it is not a very material element of value to be considered in rate making.

There was another item that was taken into consideration at the same time by this engineer.

Mr. LA FOLLETTE. If the Senator will permit me, there was evidently just the employment of the engineer's imagination in that case, and the Interstate Commerce Commission was utterly helpless and powerless, and so they appealed to Congress, as they have done for the last 9 or 10 years, to give them authority to ascertain the value of the properties of the railroad company, in order that they might meet just such testimony as that. But let me say to the Senator on that question, that the Supreme Court of the United States has listed that as one of the values to be considered, and it has not yet by any express declaration eliminated it as a value to be ignored. So it seemed to the committee that we ought to give it its place here. I will, however, say to the Senator that I am confident that the views of all the advanced commissions of the country that are doing this valuation work are that there should be a very inconsiderable weight given to reproduction new. (Cong. Rec., Vol. 49, Pt. 4, p. 3801.)

APPENDIX C

(*Ante*, p. 25.)

STATEMENT OF SENATOR CUMMINS, ON THE FLOOR OF THE SENATE, ON THE AMENDMENT FOLLOWING THE DECISION IN THE KANSAS CITY SOUTHERN CASE

SENATOR CUMMINS (Iowa), on February 21, 1922, speaking before the Senate on Senate bill 539, relating to the physical valuation of the property of the carriers, said (Cong. Rec., Vol. 62, Pt. 3, p. 2843):

When the commission began the work of valuation in 1913 and came to the question of the lands of the companies it was confronted immediately with a very uncertain task. I will not go over the debates which I have had repeated to me and which were repeated somewhat in the hearings which we had. It is sufficient to say that the commission yielded to a decision of the Supreme Court which practically held that railroad companies were entitled to have considered the present value of their real property no matter how they acquired it. Even if it were donated either by individuals or by the Government, still the railroad companies were entitled to revenues that would produce a return upon the present value of that property, no matter how acquired. So the commission finally decided that it would ascertain the value of the lands of the railway companies with reference to the values of adjacent lands or lots as the case might be; that is to say, if the adjacent property was a farm it would ascertain the value per acre of the farm at the time of valuation and then would take as the value of the right of way of the railroad company through that farm such proportion of the entire value as the area of the right of way bore to the area of the entire farm; so that if the adjacent land was worth $100 an acre and the railway company's right

of way occupied 6 acres it attributed to that right of way a value of $600, and with like reasoning respecting lots and parts of lots. Tested by the rule which the commission adopted, all of the railway companies of the country receive the benefit of what we generally know as the unearned increment. Personally, I do not believe that a public utility company is entitled to the unearned increment, but I find myself in opposition to the Supreme Court of the United States and I yield to the judgment of that high tribunal. The commission yielded also, as it was its duty to do, and gave to the railway companies everywhere the benefit accruing in the last 75 years from the advance in real property, including farms and town lots, an advance brought about by increasing population and increasing commerce.

It made a report to Congress in which it stated that it had adopted that view, and set forth that it was utterly impossible for it to comply with that part of paragraph 2 of the law which required it to state "separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." I am only repeating the language of the commission, with which I heartily agree, when I say that it is beyond human power, it is almost an unthinkable thing to ask the Interstate Commerce Commission to report what it would cost to condemn the present right of way or purchase the present right of way of any railroad company in the United States. I simply ask Senators to think for a moment of a concrete illustration. Suppose that any Senator were asked to determine what it would cost to acquire, either by purchase or by condemnation, the right of way of the Pennsylvania Railroad Co. from New York to Chicago. The very moment that it is suggested it becomes apparent to anyone who is capable of thought that the commission could not in the very nature of things do it. There is but one such right of way, and the commission was asked to speculate and conjecture upon the amount that would be required either to condemn or

purchase the right of way, terminals, and other real property in the possession of the railroad company which could not possibly be condemned; it was already in the use of the railroad company. The commission says, and says very truly, and the Supreme Court repeated that observation afterwards, that it would be necessary to consider the situation as though the Pennsylvania Railroad were not there at all, and some one were entering upon the enterprise of acquiring such a right of way upon the assumption that there was no railroad there.

I do not believe that is necessary for me to enlarge upon that phase of the matter, because the railroad companies themselves recognized the utter impossibility of ascertaining what it would cost to acquire any right of way, for how many of the owners of adjacent property would contribute the right of way for nothing in order to secure the enhancement of values that would result from building the railway, how many would contribute a part of the right of way, and so on, no human being can say. The whole subject is one that is so clear and plain that I ought not to consume a moment upon it. It is one of the things that can not be done, and the commission so declared in its report to Congress, and asked Congress to eliminate that requirement.

How did the railroad companies treat it? The railroad companies looked at it from this point of view: They said, in substance, of course the commission can not with any certainty determine what it would cost to acquire a right of way already in possession of a railroad company and that had no duplicate in the country, but we suggest this: Ordinarily it would cost three, four, or five times as much to secure the right of way as it would cost to purchase the adjoining property, to purchase a like area, or to purchase a farm of which the right of way was a part; and so in the Minnesota Rate case, to which I shall call your attention presently, they asked the Minnesota commission to multiply the present value of the property by three or four or five, and in that way to ascertain

the excess over present value as representing the cost of condemnation of the present right of way. The Supreme Court of the United States, in passing upon that question, commented—and I shall presently read from that—upon the impossibility of doing anything of that sort.

If the position of the railroad companies had been sustained, or is sustained now, and they are able to multiply the present value of the property as ascertained by the adjacent values, it will increase the valuation of the railroads by five or six or seven billions of dollars; and that means, upon the rate of return to which I have referred, an increase in the annual burden of anywhere from $240,000,000 to $248,000,000.

The Interstate Commerce Commission refused to make that report, for the reason that I have indicated; and having finished the valuation of several railroads, including the Kansas City & Southern Railway, without making a report as to excess of cost of condemnation over present value, that railroad applied for a writ of mandamus against the commission, seeking to require it to do this impossible thing.

* * * * *

I pursue this history now. After the decision of the Supreme Court which I have just read, the commission, as any other law-abiding tribunal would do, went forward in an attempt to comply with the law and with the order of the court, and entered upon another hearing. It necessarily adopted the general philosophy of the railroad companies as to the excess of cost over present value; and that is a most repugnant phrase to be found in any statute, Mr. President. It bears no other construction than that we were attempting to give to the railroad companies a return upon something more than the present value of their property, a thing which is abhorrent to every sense of justice.

The commission then proceeded, and I know it will be interesting to observe the policy which the commission was then compelled to aoppt. Mark you,

the railroad companies were all this time claiming that after the full value had been ascertained, the value with all the increases which development and growth had brought about, then the commission must multiply that value by three or four or more as a multiplier, and in that way fix the value of the lands.

The commission did not yield to the pressure brought to bear upon it by the railroads, and complied with the order of the Supreme Court in a mild degree. It divided the lands of the railroad companies into a great number of types. For instance, the first type noted on this paper furnished me by the valuation bureau of the commission is "highly developed lot property," and it has four subdivisions under that type—one commercial, one residential, one industrial, and one mixed utility when not included in above subdivisions. It reached the conclusion that where a whole lot had been taken by a railroad company of a commercial character it would add 60 per cent to the present value so ascertained. Where a part of a lot was taken under that designation it would add 75 per cent. (Cong. Rec., Vol. 62, Pt. 3, p. 2845.)

* * * * *

I am not criticizing the Interstate Commerce Commission. It is doing the best it can under the circumstances. It has practically compromised with the railroad claim by adopting about one-third of the railroad demands; but even with the additions which are proposed in this exhibit, and which the Interstate Commerce Commission is now pursuing as well as it is able, and if no part of the further railroad claim is conceded anywhere, we will add more than $2,000,000,000 to the value of the railway lands of the United States, and, as I remarked in the beginning—and that was the reason why I did so remark—that means an annual imposition upon the people in the way of railway rates of not less than $120,000,000; and if under the testimony which is being taken all the while by the Interstate Commerce Commission the railway claim should hereafter be given further

consideration, it might add $4,000,000,000 or more to the value of these lands.

My position is, that when the railway companies receive the benefit of the unearned increment of all the lands in the United States, of which they have been in possession in many instances for more than 50 years, when rights of way which were insignificant in their cost at the time of acquisition have quadrupled and multiplied in many instances a hundred times, I think they ought to be content, and should not insist that we should not only give them the benefit of the increased value of their property as a whole, but that we should attempt to ascertain what it would cost to acquire by condemnation or purchase their particular rights of-way at the present moment. That is the whole purpose of this amendment. It is to strike out the requirement that the commission shall find the excess of cost of present condemnation over present value. They are entitled to present value, and I think the commission ought to be permitted to go its way unhampered by a statute of this sort, to ascertain, according to the rules of the law, as they understand those rules, what the present value of the lands held by the railway companies is. (Cong. Rec., Vol. 62, Pt. 3, p. 2845).

* * * * *

Mr. President, I do not intend to continue the discussion further at this time. The whole subject is so clear, the injustice of requiring the commission to do this thing is so manifest, and the utter want of any showing that injustice would be done to the railroads by eliminating this part of the statute is so conclusively established that I am at a loss to know what further I can say in supporting the amendment which I have proposed.

I do not want Congress to stand longer in the attitude of suggesting to the commission or suggesting to any court that this excess of cost is a fair and reasonable element in the value of railway property. I want to relieve the commission of an embarrassment which it creates, and permit the commission to go

forward and value the railway property, ascertain the present value of railway lands unhindered and unhampered by any expression on the part of Congress with regard to the elements which enter into that value. If I thought I could get it adopted I would be very glad to bring forward a rule which, in my judgment, the Interstate Commerce Commission should follow in ascertaining the value of lands, but I am not going to do it simply because I think the commission will reach conclusions, if it is allowed to proceed without this impossible demand, that will fairly meet the views of all the people in the country and will give us for a basis for rate making in the future a reasonable value, a value which being established will not oppress the people to whom the railroads must render their service. (Cong. Rec., Vol. 62, Pt. 3, p. 2846.)

APPENDIX D

(*Ante*, p. 28.)

STATEMENTS OF MEMBERS ON THE FLOOR OF THE HOUSE, ON THE AMENDMENT FOLLOWING THE DECISION IN THE KANSAS CITY SOUTHERN CASE

REPRESENTATIVE NEWTON (Minnesota), on June 2, 1922, speaking before the House as a Committee of the Whole House on the State of the Union, for the consideration of the bill to amend section 19-a, said (Cong. Rec., Vol. 62, Pt. 8, pp. 8055, 8057):

In 1920 Congress passed the transportation act, conferring upon the Interstate Commerce Commission the duty of establishing such rates that the carriers in a certain rate group would, under efficient management, and so forth, "earn an aggregate annual net railway operating income, equaling as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." The enactment of this legislation furnishes an added reason for obtaining the true worth and value of railroad property.

The first section of the valuation act requires the commission to define in detail as to the property used for carrier purposes the following:

A. Original cost.

B. Cost of reproduction new.

C. Cost of reproduction less depreciation.

The present bill seeks to so word this paragraph as to make it not to apply to land. This is done by inserting after the word "property" the words "other than land."

The second paragraph requires the commission in its report to state in detail and separately from improvements the following:

A. Original cost of all land, etc., used for carrier purposes as of time of dedication to public use.

B. Present value thereof.

C. Separately, original and present cost of condemnation and damages or purchase in excess of such original cost or present value.

This bill seeks to amend this paragraph by doing away with the necessity of ascertaining anything but the original cost and present value of the land. This is done by inserting a period after "present value of the same" and striking out the remainder of the paragraph and its reference to "excess of cost of acquisition."

The passage of the valuation act was followed by the decision of the Supreme Court in the Minnesota Rate Case, which will be found in two hundred and thirteen United States, page 352. In this opinion the court condemned this principle of the excess of the cost of acquisition of real property as a basis of value for rate-making purposes. I quote from the decision of the court herewith:

"The company would certainly have no ground for complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without addition by the use of multipliers or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved."

As a result of this decision the Interstate Commerce Commission never ascertained this excess cost of the acquisition of new land. The commission proceeded to ascertain the value of the various railroad lands without regard to this provision. They so valued the Kansas City Southern Railway system and served a tentative valuation without these figures upon that road. The railroad company brought mandamus proceedings against the commission to compel the commission to find and report this excess cost of acquiring land. The case finally reached the Supreme Court. It will be found in Two hundred

and fifty-second United States, page 178. In this case the court in nowise qualified its opinion in the Minnesota Rate case as to the unreliability and lack of worth of such information for rate purposes. But the court said that "Congress undisputably had the authority to impose upon the commission the duty in question"; and that the commission was not at liberty to disobey the express mandate of Congress, even if in its judgment the information was valueless or deficient or impossible to acquire.

The commission has been asking Congress to change the law ever since that time. The question before this House is whether we feel that this excess of cost over original cost of acquiring real property is a proper element upon which to find value for rate making or other purposes. It must be remembered that this amendment applies only to land valuation. There is no attempt to amend the law as to personal property or as to improvements upon the land. The cost of reproduction theory should not apply to land. You can not reproduce land; neither does land depreciate with use.

* * * * *

The railroads, however, are not content with present value as a rate basis. They want the commission to take into consideration a certain fictitious value which is in excess of the present value. Let me illustrate: Here is a railroad right of way of 100 acres. The original cost of acquisition was $10 per acre, or $1,000 per tract. The original cost, therefore, would be $1,000. To-day the market value of adjoining farm land is $20 per acre. If there are 100 acres in the right of way, the present market value of the right of way is $2,000. This is the method of valuation that the Supreme Court approved in the *Minnesota Rate case.* This is the valuation method that the commission used until the decision in the *Kansas City Southern case.* The railroad, however, is not content with this method of valuation. It wants to add to this what it would cost now to condemn 100 acres from this farming

country, now worth double its original value. This present value would not be there if there had not been a railroad. There could not have been a railroad without the railroads originally acquiring the land upon which the road was built, and the cost of acquisition of this land, of course, is already figured in the value not only as to the original cost but in the present value, for the present value is made up in part by the original cost of acquisition. Of course, there is no question but what to-day if the railroad wanted additional an acre it might possibly cost much more than $20 per acre to acquire this particular tract. This would depend altogether upon the circumstances. There is no way of telling who would sell fairly or unfairly. One man might force the railroad to the expense of condemnation proceedings and another might not. It is all speculative and mere guesswork. To arrive at it you must assume that where there is a railroad there is none.

* * * * *

To sum up: Congress has heretofore passed a law—the valuation act—which requires the commission to ascertain and report incompetent and irrelevant evidence as to the value of railroad land. This bill says that such evidence need not be further gathered and what has been gathered need not be considered by the commission or be presented in court by the commission in any valuation proceedings. Of course, if the carriers themselves desire to present such evidence in a court proceeding, and the court should desire to consider it, this bill would in nowise prevent it. The whole question is whether we are to aid the railroads of the country in compelling the Interstate Commerce Commission to allow this multiplied land value in the work that they are doing in valuing the railroads of the country. There should be but one answer. This Congress should not countenance in any way the gathering and consideration of this guesswork information under a doctrine which is unsound in every way and which if applied will mean multiplied and unjustifiable burdens upon our people.

Mr. Chairman, under leave granted to extend, I insert a table from the Bureau of Valuation of the Interstate Commerce Commission, showing the multiples used in arriving at this excess of cost of acquisition view of real property, which table has been in use since the decision in the Kansas City Southern case. I also insert another table from the commission, showing comparison between present value and excess of cost of acquisition as to 100 carriers. (Cong. Rec., Vol. 62, Pt. 8, p. 8057.)

REPRESENTATIVE GRAHAM (Illinois), on June 2, 1922, speaking before the House as a Committee of the Whole House on the state of the Union, for the consideration of the bill to amend section 19–a, said (Cong. Rec., Vol. 62, Pt. 8, p. 8063):

My time is almost ended, and I must, therefore, conclude my remarks. However, let me call your attention to the fact that with the last clause stricken from this second section of the law the law will still require a statement and report of "the present value of the same," referring to real estate. If it is claimed that by omitting this language in question, directing an ascertainment of the present condemnation cost, we are taking from the law an element of value which the railroads are entitled to and which they can establish in court. Permit me to suggest that the remaining language of the act gives them the right to the present value of their property, and this will be fixed by the rules of law and will include every possible element of value.

Recent experience has proved the lack of wisdom of writing into railroad legislation some particular provision or direction or indication of congressional opinion for the guidance of the Interstate Commerce Commission. I need only refer to the very unwise provision in the present transportation act, fixing an arbitrary standard of earnings at 5½ or 6 per cent, a provision which has been slavishly followed by the Interstate Commerce Commission, which contends

this is a mandate of Congress. Let us in the future avoid such mandates so far as possible, if we do not want them followed by the Interstate Commerce Commission and railroads.

This law will take from the railroad valuations a very considerable sum to which, in my judgment, the railroads are not entitled, and which will have a tendency to reduce the valuation upon which freight and passenger rates are figured, and therefore ought to have a tendency to help reduce such rates and fares. This is something greatly required.

REPRESENTATIVE MERRITT (Connecticut), on June 2, 1922, speaking before the House as a Committee of the Whole House on the state of the Union, for the consideration of the bill to amend section 19–a, said (Cong. Rec., Vol 62, Pt. 8, p. 8059):

After the well-known *Minnesota Rate case* the valuation committee of the Interstate Commerce Commission so interpreted the decision as to make it unnecessary for them to obey the last clause in paragraph 2 of the valuation act, and they went ahead and made a number of tentative valuations without reporting separately, as required by the act, the original and present cost of condemnation and damages or purchase in excess of original cost or present value.

The *Minnesota Rate case* was decided in June, 1913. In March, 1920, the *Kansas City Southern case* was decided by the Supreme Court, and that decision set forth clearly that the interpretation of the Interstate Commerce Commission of the decision of the court in the *Minnesota Rate case* was erroneous. In the *Kansas City Southern case* the Supreme Court quotes the reasoning which led the commission to disregard the last part of section 2, * * *.

* * * * *

We believe, on the contrary, that it will not hasten the final report of the commission, and certainly will not hasten the final determination by the courts of

the railway valuation, because it is almost certain that this final decision will have to be made by the courts, owing to difference of view between different parties interested. It must be borne in mind that in view of existing law these railway valuations are of very great importance in many directions. They are to be used as a basis for rates at the present time and also as a basis for possible future consolidations or combinations. It is of great moment, therefore, that they be settled not only as promptly as possible but accurately. The Interstate Commerce Commission and the State commissions contend that under the Minnesota rate cases the court has decided—and that this decision has not been reversed by the *Kansas City Southern case*—that it is not proper to add the costs of acquisition to the present value of the lands, ascertained by the present cost of lands in the vicinity of the right of way. Accordingly, although the commission has found this cost, and in a manner which Director Prouty says is reasonably accurate, it has not in fact allowed this element of value to enter into its final valuations as reported.

If this bill becomes a law, apparently the first result will be that the Interstate Commerce Commission must recall their tentative valuations and eliminate therefrom the information which they have not obtained to carry out section 2 under the instruction of the court.

Mr. WHITE of Maine. That is the tentative valuation in the case of some 200 railroads.

Mr. MERRITT. Yes; but suppose that the contention of the railways turns out to be correct and that a proper interpretation of the *Minnesota rate cases* and the *Kansas City Southern rate case* is that the information called for by section 2 is a proper element to be considered in fixing a final value. Then we shall be in the position indicated in the *Monongahela case*—that we have tried by legislation to settle a judicial question, and then the Interstate Commerce Commission will have to do its work over

again. Stated in a practical manner, the information which the commission has already obtained in accordance with section 2 can do no harm. Whatever expense is involved has already been incurred and the information has been obtained. The valuations have not as yet been affected, according to the testimony of the commission, but the information is there so that the court can pass on it. If the information is removed by this legislation, and the court does not have it for its information, then it is quite possible that the whole matter may be set back and this necessary valuation be delayed for an unknown period.

It appears, therefore, that both on account of justice and for practical results this bill is unwise and should not be passed. (Cong. Rec., Vol. 62, Pt. 8, p. 8061.)

* * * * *

REPRESENTATIVE DENISON (Illinois), on June 2, 1922, speaking before the House as a Committee of the Whole House on the state of the Union, for the consideration of the bill to amend section 19–a, said (Cong. Rec., Vol. 62, Pt. 8, p. 8067):

Now, this is the reason why I do not think we ought to pass this bill. By passing this bill we are directing the Interstate Commerce Commission to disregard the present cost of construction so far as land is concerned. Suppose we do that and the commission follows the mandate of Congress and disregards the present cost of construction, so far as land is concerned, and makes its valuation of property of the railroads, and the railroads object to the valuation because the commission has not taken into consideration an element which the Supreme Court of the United States through Mr. Justice Harlan said in Smythe against Ames is a proper or necessary element in ascertaining the value of the property. The result will be that the valuations will be set aside, just as verdicts in condemnation cases are set aside when the

jury have not been allowed to take into consideration *elements of value that are proper to be taken into* consideration. Congress can not say what evidence shall or shall not be taken into consideration by a jury in a condemnation proceeding. That is a question of law for the courts. We may pass laws limiting the evidence which may be considered, but such laws will not amount to anything. The Supreme Court will set them aside as invalid if we do not include all the elements that are necessary or proper to be considered in a condemnation proceeding in order that the constitutional requirement that private property may not be taken without just compensation may be satisfied.

* * * * *

The Constitution says that no one shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation. In order to determine the just compensation you have to determine the value of the property taken. The question of the evidence that shall be considered in determining the value of the property taken is a judicial question. It is not a legislative question. I am sure my friend from Nebraska recognizes that to be the case. Congress could not pass any law that would deprive any railroad or anyone else of any proper evidence to be considered in fixing the value of his property. To do so would be tantamount to depriving him of his property without due process of law or without just compensation.

It seems to me that the Supreme Court in the *Kansas City Southern case* (252 U. S. 178) conclusively settled the question involved in this proposed legislation, and that in view of that decision this bill ought not to be passed. The Interstate Commerce Commission accepted literally the views of the court as expressed in the *Minnesota Rate case* and governed their action in accordance with the language of the court in that case. The commission in presenting its

argument to the court in the *Kansas City Southern case* took exactly the position that is being taken to-day by those who are advocating this legislation.

REPRESENTATIVE MAPES (Michigan), on June 2, 1922, speaking before the House as a Committee of the Whole House on the State of the Union, for the consideration of the bill to amend section 19–a, said (Cong. Rec., Vol. 62, Pt. 8, p. 8061):

Mr. Chairman, the railroad valuation act requires the Interstate Commerce Commission in making and reporting the valuation of the railroads to state, among other things, "in detail and separately from improvements the original cost" and the "present value" "of all lands, rights of way, and terminals owned or used for the purposes of a common carrier," "and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." This bill proposes to strike out the language "and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." If the bill becomes a law the Interstate Commerce Commission will still be required to find both the original cost and the present value "of all lands, rights of way, and terminals" used for railroad purposes.

What does the language which the bill proposes to strike out mean? After giving some study and consideration to the subject I am willing for my part to subscribe to the statement of the chief counsel of the Interstate Commerce Commission in the hearings on a similar bill in the last Congress, "that nobody can tell." He says further "that it is absolutely impossible to construe" the language "so that you can do anything more than guess at the probable meaning that Congress intended to convey when it used those words," and that as a "practical matter" no man can do anything "except guess"

when he undertakes to comply with that provision of the statute.

* * * * *

What use is made of these findings of the excess cost after they have been found? The Bureau of Valuation and the Interstate Commerce Commission take the position that the excess-cost element is not a proper element to be considered in arriving at the present or real value of the railroad property, and they have not considered it in fixing the tentative values so far. They find the excess cost because they are required to do so by the statute as interpreted by the Supreme Court, but make no practical use of it. It is not considered by the commission as an element which should be included in arriving at the present value.

In view of this position of the commission it seems to be an idle procedure and an unnecessary expenditure of time and money to require it to find something which after it is found is put to no practical use.

If Congress could be assured that the courts would sustain the Interstate Commerce Commission in the position which it has taken in regard to the matter perhaps no harm could come from the present law further than the additional expense incurred and the time consumed in finding this excess cost. The danger, however, is that the courts will require the commission, in fixing the final valuations of the railroads, to take this excess cost into consideration unless this bill passes and this language is stricken out. The railroad representatives frankly say that they expect to test the matter in the courts and to ask the courts to compel the commission to include or consider the excess cost item as an element in the final valuation of the railroads.

If this is done, the importance of the matter is at once apparent. Nobody knows just how much it would mean, and the estimates vary widely. I have been told that the valuation of the lands, rights of way, and terminals of the railroads used for carrier

purposes on the excess-cost basis would be nearly double the present value of the same. I have also been told that the present value of the same—that is, the present value of the lands, rights of way, and terminals of the carriers used for carrier purposes—is about 25 per cent of the total valuation of the railroad property. The estimated total valuation of the property of the railroads now is $18,990,000,000. Twenty-five per cent of that is over four and one-half billion dollars. If these figures are anywhere near accurate, it can readily be seen what it might mean to have this amount or any part of it added to the present tentative valuation of the railroad property for rate making and other purposes. (Cong. Rec., Vol. 62, Pt. 8, p. 8062.)

REPRESENTATIVE HOCH (Kansas), on June 2, 1922, speaking before the House as a Committee of the Whole House on the State of the Union, for the consideration of the bill to amend section 19-a, said (Cong. Rec., Vol. 62, Pt. 8, p. 8068):

I have here a list of the first 100 railroads upon which tentative final values have been fixed by the Interstate Commerce Commission. It so happens that practically all of them are small railroads, with a total mileage of only about 10,000 miles out of 245,000 miles upon which final values are ultimately to be fixed. Upon those first 100 railroads the commission finds that the present value of the railroad lands is $42,240,816. We do not have all of the figures, but it is probable that the original cost of those lands was not over $15,000,000. In other words, the present value is found, giving them a value of approximately three times what they originally cost. But that is not all they are asking. They are asking for this speculative reacquisition cost. The commission estimates it would cost, in addition to the present value, $34,330,214. In other words, they figure that while the present value of the lands of those 100 railroads is $42,240,816—and that gives

them the benefit of what other land has had in normal increase in value—the hypothetical cost of acquisition now, with other land values high as they are, would be $76,580,930. And that is the value that the railroads are asking to have put upon their land.

As another specific illustration, take the case of the valuation put upon the land of the Rock Island Railroad in my own State of Kansas. The Interstate Commerce Commission recently issued its tentative final values upon the Rock Island. It fixes the present value of the Rock Island lands in Kansas at $3,063,345. That figure gives to the Rock Island the benefit of the normal unearned increment—the increment enjoyed by other lands. But, following out the direction contained in the provision of the valuation act which we are here seeking to strike out, it figures the present cost of acquisition of the same lands at $6,071,257. Now, since the Rock Island has those lands, and does not have to acquire them under the present state of development of the country, what reason or fairness is there in giving consideration to a speculation as to what it might cost the Rock Island to acquire them to-day? Is not an allowance of the present value all, in any view of the matter, that they are entitled to?

APPENDIX E

(Ante, p. 35)

STATEMENTS OF SENATOR OWEN AND REPRESENTATIVE OLMSTED ON EFFECT OF TENTATIVE AND FINAL VALUATIONS

SENATOR OWEN (Oklahoma), on February 24, 1913, speaking before the Senate as in Committee of the Whole, said (Cong. Rec., Vol. 49, Pt. 4, p. 3802, 3803):

Mr. President, the words "prima facie" in line 12 necessarily exclude finality. It is only prima facie as to the fact. The fact itself may be disputed; but the principle to which the Senator very properly refers would not appear in this finding.

The facts have been ascertained prima facie, the facts themselves being subject to correction, then the principle of whether or not the unearned increment could be capitalized and the public charged with interest upon the unearned increment is a principle to be determined by the court upon debate. Facts, merely, are ascertained; and even the facts are not ascertained with complete finality, but merely prima facie.

The Senator from Minnesota points out that the statement that "If, upon the trial of any action involving a final value," the value fixed by the commission, "evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto," it shall send it back for ascertainment of the fact before the court proceeds—is only a declaration that this finding of fact upon certain evidence submitted shall not be final, but may be again sent back if those concerned offer additional evidence which was not before the commission. The purpose of that section is to prevent a trick of discrediting those who find the facts by submitting to those charged with the finding of the facts incomplete evidence which afterwards is more completely submitted to the court, and the court,

finding that additional evidence or materially different evidence is submitted to the court from that which was originally submitted to the commission, simply sends it back, as a court would send a case back to a commissioner to further ascertain the fact upon new evidence.

That answers the question of the Senator from Minnesota. I have already answered the question submitted by the Senator from Kansas.

REPRESENTATIVE OLMSTED (Pennsylvania), on December 3, 1912, Concerning the Committee Report, said (Cong. Rec., Vol. 49, Pt. 1, p. 71):

We are given to understand that the valuation is for the purpose of assisting the commission in fixing the rates which may be charged by common carriers. It is to be one of the elements at least. The rates which a common carrier may charge, the right to charge a rate, is its most important right. Without that right a railroad would have very little physical or other valuation, and it seems to me that in a matter so important as that the common carrier itself ought to have some notice of the taking of testimony and the right to be present and examine and cross-examine witnesses.

That is the sole purpose and object of my proposed amendment. If the physical valuation of railroads, which is to be determined by the commission in the matter pointed out by this bill, is to be used as the basis for the fixing of rates by the Interstate Commerce Commission, it is no more than fair and equitable, and in harmony with universally recognized principles of enlightened civilization, that the party to be affected shall have notice and an opportunity to be heard. It is true that the bill does provide that after the Interstate Commerce Commission, through its agents, experts, or other assistants, shall have concluded the taking of testimony, and the commission, based upon such testimony, shall have adjudicated the matter and fixed the valuation, the carrier may have 30 days

within which to file a protest, and that upon the filing of any protest by a common carrier—

"The commission shall fix a time for hearing the same and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented by such common carrier in support of its protest so filed."

The bill, however, makes no provision for the taking of testimony upon such a hearing. If witnesses were desired to be recalled for examination or cross-examination, the common carrier would have to hunt them up, and it would have no power to compel their attendance. The whole proceeding would be, in any event, anomalous and unreasonable. It would be like depriving a defendant of the right to participate in the taking of testimony on the trial of his case and then allowing him the mere right to file a protest after the court shall have entered judgment against him. There is no State in this Union under the laws of which $10 worth of property could be taken from any man in a proceeding in which he was not permitted to cross-examine the witnesses produced against him or to call witnesses in his own behalf; and surely that ordinary right and privilege ought not to be denied in a matter the determination of which may, and in many instances will, involve millions of dollars. This is, in any event, a remarkable provision in the bill, that "for the purpose of such an investigation and ascertainment of value, the commission is authorized to employ such engineers, experts, and other assistants as may be necessary, who shall have power to administer oaths, examine witnesses, and take testimony."

My amendment adds, after the word "testimony," these words: "Upon three days' notice to the common carrier which shall be permitted to attend by counsel or otherwise and examine or cross-examine witnesses and to call and examine other witnesses."

It seems to me that, upon the commonest principles of justice, the amendment ought to prevail.

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SUBJECT INDEX.

Page.

STATEMENT 1-6

ARGUMENT:

I. THE FACTS PLEADED ARE NOT SUFFICIENT TO ENTITLE PETITIONERS TO RELIEF IN EQUITY 6-14

II. THE ORDER OF MARCH 28, 1923, IS SIMPLY AN INTERLOCUTORY ORDER OF THE COMMISSION, WITH WHICH THE COURT WILL NOT INTERFERE UNDER THE CIRCUMSTANCES DISCLOSED BY THE RECORD IN THIS CASE 14-17

III. THE QUESTIONS PRESENTED FOR DETERMINATION BY THE PETITION ARE NOT COVERED BY THE GENERAL EQUITY JURISDICTION OF THE COURT, BECAUSE THEY ARE INVOLVED IN AND DEPEND UPON THE PROVISIONS OF THE INTERSTATE COMMERCE ACT 17-18

IV. THE PETITION DOES NOT SHOW THAT APPELLANTS OR ANY OF THEM WILL SUFFER LEGAL INJURY OR BE HARMED IN ANY WAY IF THE RELIEF ASKED FOR IN AND BY THE PETITION IS NOT GRANTED BY THE COURT 18-19

TABLE OF CASES.

Interstate Commerce Commission v. *Humboldt Steamship Company*, 224 U. S. 474 17

Lane v. *Mickadiet*, 241 U. S. 201 16

New England Divisions case, 261 U. S. 184 11,12

Proctor & Gamble v. *United States*, 225 U. S. 282 17

Texas Midland Railroad, 1 Val. Rep. 1, 108 14

The San Pedro, Los Angeles & Salt Lake Valuation case, 75 I. C. C. 463 9

In the Supreme Court of the United States.

OCTOBER TERM, 192[illegible]

THE DELAWARE AND HUDSON COMPANY, et al., appellants
v.
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellees.

In Equity, No. [illegible] 212

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the Southern District of New York, declining to enjoin enforcement of a tentative valuation order of the Interstate Commerce Commission, dated March 28, 1923, and dismissing the petition filed in that court by appellants. In describing the subject matter of complaint and the issues relating thereto raised by the pleadings of the parties, and in calling attention to evidence introduced on behalf of the appellants, the lower court said:

> The Interstate Commerce Act as amended (Sec. 19a) requires the Commission to "investigate, ascertain and report the value of all the property owned or used by every com-

mon carrier subject to the provisions of this act."

The Commission having arrived at a valuation of the property of the petitioners, has embodied the same in what is called a "tentative valuation" in subsections f and h of said Section 19a.

Petitioners being dissatisfied with said "tentative valuation," bring this petition seeking a decree that said "tentative valuation" of the Commission "be set aside, annulled, and suspended, and that a permanent injunction issue preventing the entry of any order fixing final value before a lawful tentative valuation has been made."

The present motion is, in the language of the petition, for "an interlocutory injunction suspending and restraining the enforcement, operation, and execution of said (tentative valuation) in whole or in part and setting the same aside."

The motion coming on to be heard before the above-named Judges pursuant to Jud. Cod. Sec. 266, petitioners filed certain affidavits in support of said motion, and proved that they had on or about May 10, 1923, and within thirty days of the filing of said tentative valuation filed a "protest of the same" pursuant to said Interstate Commerce Act, Sec. 19a, subsection h; and thereupon both the respondent and the intervenor filed motions to dismiss the petition substantially on the following grounds:

1st. The Court has no jurisdiction over the subject matter of the petition and may not

properly grant any portion of the relief prayed for therein;

2d. The facts pleaded are insufficient to entitle petitioners to any relief in equity. (Rec. 256–257.)

In pointing out the particulars wherein appellants contend that the tentative valuations of the Commission are not a full compliance with said section 19a, commonly called the Valuation Act, and in stating its conclusions in the premises, the lower court further said:

> An examination of the petition and a comparison thereof with the protest filed by petitioners shows that the substance of complaint may be summarily stated as follows: The Commission did not ascertain the original cost to date of each piece of property other than land used by petitioners for common carrier purposes; it did not report in detail the original cost of lands, rights of way and terminals owned or used for common carrier purposes by petitioners; it did not report the original cost and present value or either of any property held by petitioners for purposes other than those of a common carrier; it omitted certain specified railroad tracks or portions thereof which one of said petitioners is entitled to use as well as certain other railway and/or terminal adjuncts used by one of the petitioners jointly with other carriers; and it did not report the value *as a whole* of the properties of petitioners.
>
> We have not set forth all the objections of petitioners, but the above are sufficient to in-

dicate the kind of objection made, on which and by reason of which it is demanded that the "tentative valuation" be suppressed and held for naught.

We repeat that we regard this "tentative valuation" under the statute as an *ex parte* appraisement. Any such matter necessarily gives rise to many differences of opinion. The evident object of the statute is to ascertain for purposes of rate making and money borrowing the reasonable and probable going value of that property which is devoted to serving the public as a common carrier. What particular pieces of property are so used is oftentimes matter of opinion about which honest and well-informed men may differ. As to original cost, it is to be remembered that at least one of these petitioners can trace its corporate life backward for nearly a century; and the ascertainment of some items of original cost, as well as added cost, may be in the opinion of many if not most men a veritable impossibility.

No statute law should be held to require the impossible unless the language thereof permits of any [*no*] other interpretation. It would serve no useful purpose to go into detail, but after examination this court is of opinion that the Commission's "tentative valuation" complies with the spirit of the statute, and on its face comes as near to complying with the letter as the facts permitted, in the Commission's opinion.

Argument has developed as petitioners' legal position, that they are entitled to a literal

compliance with the statute because the protest (treated as a pleading) puts them in the position of plaintiffs upon whom lies the burden of proving that the "tentative valuation" is erroneous, incomplete or otherwise unjust.

We perceive no force in this objection; and think that the protest no more than serves to limit discussion of the questions of fact and law which must arise upon any such valuation.

If the statute required no tentative valuation and petitioners asserted (as they do assert by their published accounts) a certain stated value for their possessions, it would still and always be incumbent upon them to prove the correctness of their own figures. They are in no worse position by reason of anything that has been done.

Entertaining these views, we are of opinion (1) that the Commission has reasonably complied with the requirement of the statute in respect of "tentative valuation," and (2) that the petitioners are not placed in any legally disadvantageous position by any act of the Commission.

We therefore conclude that there is no equity in this application to suppress a merely preliminary step in a lawful valuation proceeding, and for that reason dismiss the petition without costs. (Rec. 258–259.)

Appellants' assignments of error are nineteen in number, but, aside from those which are general in character, we think the assignments may be summarized as follows:

In view of the errors of omission and commission shown by the allegations contained in

the petition, the court erred in holding that the tentative valuation order of March 28, 1923, constitutes a reasonable compliance with the Valuation Act of March 1, 1913.

ARGUMENT

I.

THE FACTS PLEADED ARE NOT SUFFICIENT TO ENTITLE PETITIONERS TO RELIEF IN EQUITY.

Appellants' objections to the tentative valuation order of March 28, 1923, are set forth in Paragraph XVIII of the petition as follows:

> 1. It was not preceded by the investigation prescribed by said Section 19a and is not based upon the results or record of any such investigation.
>
> 2. Said Commission refused to include large amounts of property owned or used by petitioners.
>
> 3. Said Commission refused to apply and use, or to attempt to apply or use, the actual and current prices prevailing on the date of the inventory or inventories on which it relied.
>
> 4. Said Commission refused to value the actual working capital of petitioners but instead of so doing reported a value arbitrarily resulting from the use of an arbitrary general formula.
>
> 5. It does not purport to contain a report of the original cost to date of the property used for common carrier purposes.
>
> 6. It does not purport to contain a report of the original cost of the lands, rights of way,

and terminals used for common carrier purposes, ascertained as of the time of dedication to public use or otherwise.

7. It does not purport to contain a report of the original cost, or the present value, of the property held for purposes other than those of a common carrier.

8. It does not purport to contain a report of the value of the property or properties as a whole.

9. It does not purport to contain a report of the value of the property or properties as a whole in each, or any, of the separate States in which located.

10. It does not purport to contain a report of other values and elements of value that are not included in the several costs enumerated in said Section 19a.

11. It does not purport to include an analysis of the methods by which the several costs were ascertained or the reasons for their differences.

12. It does not purport to include an analysis of the methods of valuation employed or the reasons for the differences between other values and elements of value and the cost values or any of them.

13. It does not purport to contain an analysis of the methods of valuation employed in respect of property held for purposes other than those of a common carrier. (Rec. 11.)

No separate answer will be made to objection No. 1 for the reason that it appears to be based upon statements included in some of the other objections.

88272—24—2

No. 2 relates to the use for common-carrier purposes of certain railroad tracks and terminal facilities, described in Paragraphs XIII and XIV of the petition and owned by the Erie Railroad Company and other common carriers, jointly by appellant, The Delaware and Hudson Company, and said owners. The Commission has tentatively concluded that said properties must be inventorized to the owning carriers, and that under the circumstances described it would not be proper to include any portion thereof in the inventory of said appellant. In this connection we call attention to paragraph (1) of section 15a of the interstate commerce act, which shows that expenditures to be made by said appellant for the right to use in part properties owned by other common carriers as aforesaid, jointly with said other common carriers, are to be deducted from said appellant's operating revenues in determining its net railway operating income. Pertinent language contained in said paragraph (1) is as follows:

> * * * and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

It will be observed that rentals paid for the right to use the railroad tracks and terminal facilities mentioned, by said appellant to said owners, must be included in the railway operating revenues of the latter, but are to be deducted from the railway operating revenues of said appellant in computing

its net railway operating income. If the owners of said railroad tracks and terminal facilities are thus to be charged with all revenues derived from the use of those properties, it follows, we submit, that the properties and their values should be included in their entirety in the inventories of such owners, and that no part of any of the properties should be included in the inventory of said appellant.

A sufficient answer to No. 3 appears to us to be contained in the Commission's report in *The San Pedro, Los Angeles & Salt Lake Valuation case*, 75 I. C. C. 463, from which we quote as follows:

> *The unit prices.*—In making the estimate of cost of reproduction new of structures in use on the date of valuation, the unit prices applied were those found to obtain June 30, 1914, and during the five years, and in some instances, the 10 years, prior thereto. At the beginning of the valuation work we deemed it advisable, for purposes of comparison, and also for the purposes of securing a base for future use in fixing values as of later dates, to price all common-carrier structures as of a common date. After somewhat extensive investigation in this connection we concluded that June 30, 1914, would be a proper date to use for these purposes, and that prices arrived at in the manner heretofore described could reasonably be called normal prices for a period of time extending over a period of at least 5 or 10 years prior to that date. At that time we did not, and of course could not, foresee the material increases which have been brought

> about by the World War, but we believe what we have done would have been proper even if we had been able in 1914 to foresee what has taken place since. (Id. 474.)

No. 4 relates to working capital. For this item the Commission included in its final value of the property owned and used for common-carrier purposes by appellant, The Delaware and Hudson Company, the sum of $2,195,100. (Rec. 32.)

If this sum is not correct, said appellant will, of course, be afforded a full and fair opportunity to prove that fact in the hearing before the Commission upon its aforesaid protest, which will be held hereafter in accordance with the provisions of paragraph (i) of the Valuation Act. If the Commission's tentative conclusion concerning the amount to be included for working capital is finally found to be correct, the manner in which that conclusion was arrived at will not be a matter of importance, but we think it is apparent that no conclusion in the premises can properly be reached until after the hearing referred to has been held.

Nos. 5 and 6 relate to original cost of property used for common-carrier purposes. In Paragraphs VI and VII of the petition it is admitted that the Commission reported the original cost mentioned to the extent that, in its opinion, it was possible to do so from appellants' records and other records. If appellants have information concerning original cost which was not discovered by the Commission in the *ex parte* investigations conducted by it prior to

the making of the tentative valuations covered by the order of March 28, 1923, it will have an opportunity to impart that information to the Commission for its consideration in the hearing to be held as aforesaid under paragraph (i) of the Valuation Act.

Nos. 7, 8, 9 and 13 relate to duties which can be performed by the Commission only after it has made a full and complete investigation in connection with the properties held by appellants for purposes other than those of a common carrier. The final values included in the tentative valuations under consideration here do not include, and are not intended to include, final values of any properties other than those used by appellants for common-carrier purposes. The right of the Commission to operate in this manner, that is to say, to perform first the duties it regards as important and urgent and to defer until a later date the performance of duties it considers less important and urgent, was recognized by this court in the *New England Divisions case*, 261 U. S. 184. In that case it was contended that the order of the Commission involved was invalid because it did not cover fully the subject matter to which it was related, and in holding the contention to be unsound this court said:

> A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under

> such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution. (Id. 201.)

The principle involved in the *New England Divisions case*, and covered by the above quotation, appears to us to be the same as the one involved in this case and covered by the objections last above referred to. There, as here, the Commission made an order which was not entirely comprehensive of the subject matter it had under consideration, but which was appropriate and capable of definite application. We therefore submit that the order of March 28 is not invalid simply because the final values included therein are confined to properties used for common-carrier purposes and do not cover also properties held for purposes other than those of a common carrier.

Nos. 10, 11, and 12 relate to duties imposed upon the Commission by paragraph (b) First of the Valuation Act, which reads as follows:

> In such investigation said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of repro-

> duction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

Concerning the "other values and elements of value" referred to, the Commission, in the next to the last paragraph of each of the tentative valuations involved, said:

> No other values or elements of value to which specific sums can now be ascribed are found. (Rec. 32, 37, 43, 47, 49, 52, 55, 58, 62, 64.)

In the absence of any "other values or elements of value" to which they could be applied, it is apparent that the "analysis of methods" and "reasons for differences," which are mentioned in objection No. 12, could not be made the subject of a report by the Commission.

The "analysis of methods" and "reasons for differences" referred to in objection No. 11, and which are called for by the provisions contained in the first portion of said paragraph (b) First, are covered by a paragraph contained in said order of March 28, 1923, under the heading "In General," which reads as follows:

> Reference is made to Appendix 3 of the report in *Texas Midland Railroad*, 1 Val. Rep.

> 1, 108, which is hereby made a part hereof, for a statement of the methods employed and of the reasons for the differences between the various cost values reported. (Rec. 64.)

The appendix mentioned begins on page 108, as stated by the Commission as aforesaid, and ends on page 186, and an examination of same will show that it is very full and complete. Since the appendix is made a part of each of the tentative valuations covered by the order of March 28, 1923, we find it difficult to understand why objection No. 11 was included in their petition by appellants.

We respectfully submit that the matters to which we have called attention under this heading fully justify the lower court's holding that the tentative valuation of March 28, 1923, constitutes a reasonable compliance with the Valuation Act of March 1, 1913.

II.

THE ORDER OF MARCH 28, 1923, IS SIMPLY AN INTERLOCUTORY ORDER OF THE COMMISSION, WITH WHICH THE COURT WILL NOT INTERFERE UNDER THE CIRCUMSTANCES DISCLOSED BY THE RECORD IN THIS CASE.

In so far as any proceedings in court are contemplated by the interstate commerce act, it will be observed, from an examination of paragraphs (h), (i) and (j) of section 19a of the act, commonly called the Valuation Act (Rec. 4–5), that the jurisdiction of the court is not to be exercised until after there has been a hearing before the Commission upon matters covered by any protest or protests which

may be filed against the tentative valuation and a determination of such matters by the Commission. In other words the court is not to assume jurisdiction over, or act in connection with, any question either of law or of fact advanced in support of such objections as may be made to the tentative valuation until after the Commission has had an opportunity to do so. That appellants are endeavoring to deprive the Commission of such an opportunity is clearly shown by the petition, and we therefore insist that by instituting this suit in court the appellants have acted prematurely in the premises.

In speaking of the issues raised by the protests filed by appellants on or about May 10, 1923, the lower court, as hereinbefore shown, said:

> Having raised these two questions, however, petitioners bring what is practically a bill in equity for the purpose of avoiding the necessity of trying the issues presented in the manner aforesaid; such prevention of trial being brought about by demanding a decree totally suppressing said "tentative valuation." (Rec. 257.)
>
> Argument has developed as petitioners' legal position, that they are entitled to a literal compliance with the statute because the protest (treated as a pleading) puts them in the position of plaintiffs upon whom lies the burden of proving the "tentative valuation" is erroneous, incomplete or otherwise unjust.
>
> We perceive no force in this objection; and think that the protest no more than serves to

> limit discussion of the questions of fact and law which must arise upon any such valuation. (Rec. 259.)

The order of March 28 was made, and served upon appellants and other interested parties, for the purpose of affording to them an opportunity to have heard and determined by the Commission matters included in such protests against the tentative valuations covered by the order as they might see fit to make, and also to give to the Commission an opportunity to make such changes in the tentative valuations as it may consider necessary and proper after the hearing has been held.

In *Lane* v. *Mickadiet*, 241 U. S. 201, this court, speaking by Mr. Chief Justice White, said:

> * * * As there is no dispute, and could be none, concerning the general rule that courts have no power to interfere with the performance by the Land Department of the administrative duties devolving upon it, however much they may when the functions of that Department are at an end correct as between proper parties errors of law committed in the administration of the land laws by the Department, it must follow that unless it be that this case by some exception is taken out of the general rule that there was no power in the court below to control the action of the Secretary of the Interior and reversal therefore must follow, * * *. (Id. 207–208.)

If the courts will not interfere with the performance by the Land Department of an administrative duty devolving upon it, until after the functions of that

department are at an end, it necessarily follows, we submit, that the courts will not interfere with the performance by the Commission of the duty of determining questions presented by protests filed with the Commission against tentative valuations like those under consideration here, until after the functions of the Commission are at an end. In *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, pertinent language used by this court was as follows:

> * * * The Interstate Commerce Commission is purely an administrative body, * * *. (Id. 484.)

III.

THE QUESTIONS PRESENTED FOR DETERMINATION BY THE PETITION ARE NOT COVERED BY THE GENERAL EQUITY JURISDICTION OF THE COURT, BECAUSE THEY ARE INVOLVED IN AND DEPEND UPON THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

Reasons in support of this point were clearly and concisely stated by the court in its decision in *Procter & Gamble* v. *United States*, 225 U. S. 282, from which we quote as follows:

> Some suggestion is made in argument concerning the alleged claim of constitutional right asserted in the petition filed below and which the court disposed of in the manner we have stated. But what we have said suffices to point out the fallacy which the contention involves, for the following reasons: If the claim of constitutional rights concerned a subject which from its very nature and effect dominated the act to regulate

> commerce and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the Commerce Court, as it could not so be without violating the express reservation and restriction as to the general power of the Circuit Courts which we have just quoted. If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce that question in the nature of things was subject to the precedent action of the Commission on the subjects committed to it by the act to regulate commerce and as to which the court had jurisdiction alone to act in virtue of a prior affirmative order of the Commission. (Id. 301.)

If the court were to take such action in this case as is requested in the prayer of appellants' petition, we think the inevitable result would be to unduly interfere with and disarrange the method of procedure before the Commission and in court provided for in paragraphs (h), (i) and (j) of the Valuation Act, to which we have previously referred.

IV.

THE PETITION DOES NOT SHOW THAT APPELLANTS OR ANY OF THEM WILL SUFFER LEGAL INJURY OR BE HARMED IN ANY WAY IF THE RELIEF ASKED FOR IN AND BY THE PETITION IS NOT GRANTED BY THE COURT.

We have shown that the language of the Valuation Act does not provide for or contemplate any proceedings in court until after final action in the premises has been taken by the Commission, but there is

another reason why we believe it to be apparent that this suit can not be maintained by appellants. In speaking collectively of the tentative valuations covered by the order of March 28, 1923, the lower court, as hereinbefore shown, said:

> * * * Such valuation is without any probative effect *per se;* no proceedings can be based thereupon, and it is no more than a preliminary opinion expressed by the Commission. We think the so-called "tentative valuation" is properly described as an *ex parte* appraisement. (Rec. 257.)

Because of the statements thus made by the lower court, the correctness of which we feel certain will not be questioned by counsel for appellants, we are unable to understand how it can be consistently contended that appellants or any of them will be subjected to legal injury or be harmed in any way if the order referred to is not annulled and set aside by the court.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellee.

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